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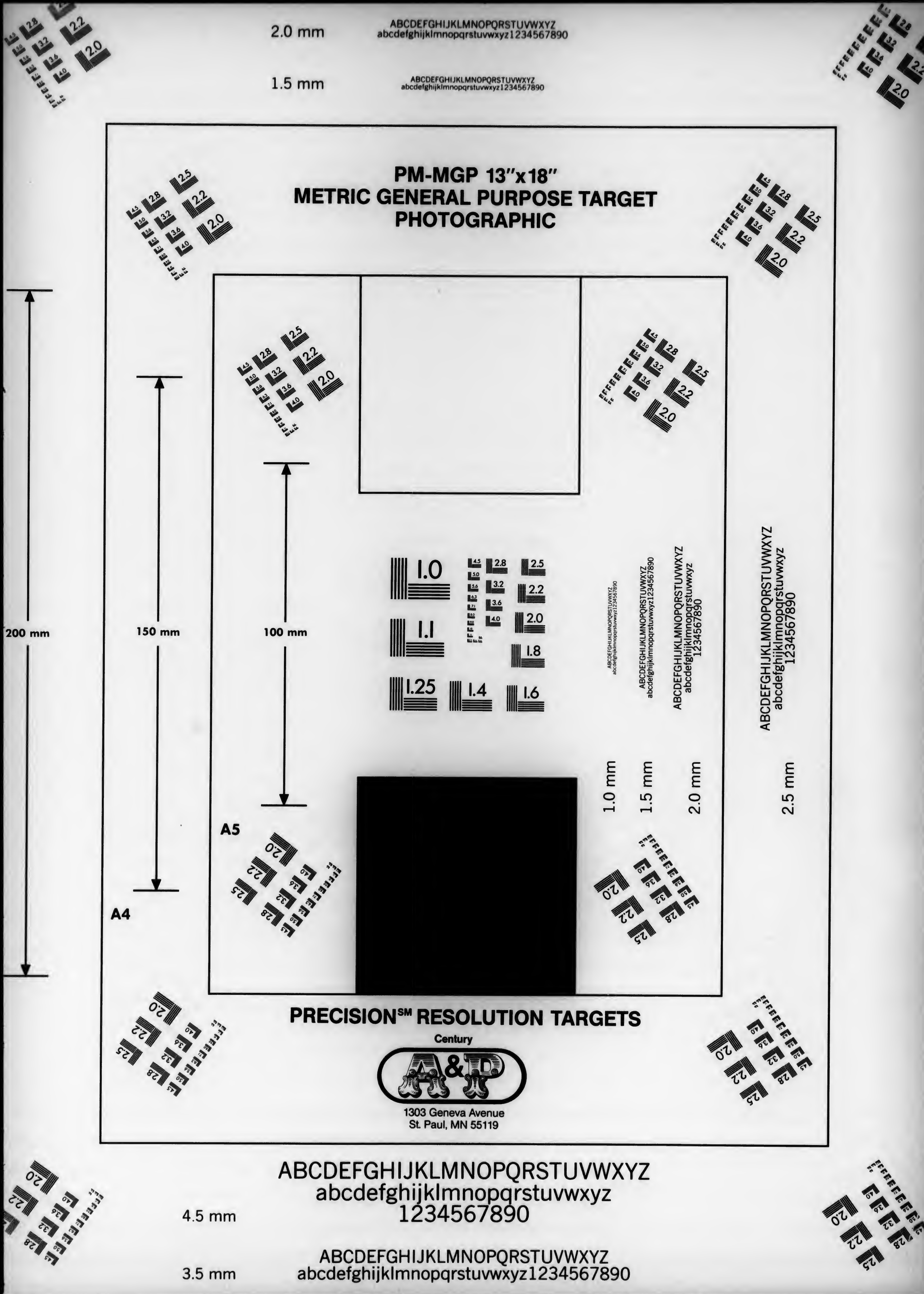
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COMMUNITY PROPERTY INCOME

HEARINGS

BEFORE A

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COMMITTEE ON WAYS AND MEANS

HOUSE OF REPRESENTATIVES

SEVENTY-THIRD CONGRESS

SECOND SESSION

ON

H.R. 8396

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HOUSE OF REPRESENTATIVES

SEVENTY-THIRD CONGRESS

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COMMUNITY PROPERTY INCOME

TUESDAY, MAY 1, 1934

House of Representatives,
Subcommittee of the Committee on Ways and Means,
Washington, D.C.

The subcommittee met at 10 a.m., Hon. Ashton C. Shallenberger (chairman) presiding.

Mr. Shallenberger. The committee will please come to order. This is a hearing called on H.R. 8396, introduced by Mr. Treadway, of Massachusetts, before a subcommittee of the Committee on Ways and Means.

A copy of the bill will be made a part of the record.

(H.R. 8396 is as follows:)

[H.R. 8396, 73d Cong., 2d sess.]

A BILL Relating to the taxation of community-property income

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse who has the management and control thereof under the law of the jurisdiction in which the marital community exists, and such spouse shall alone be entitled to the deductions and credits allowed under the internal-revenue laws which are properly allocable to such property or income.

Mr. Treadway is the first person listed on our calendar to appear and we shall be glad to hear him at this time.

STATEMENT OF HON. ALLEN T. TREADWAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS AND A MEMBER OF THE COMMITTEE ON WAYS AND MEANS

Mr. Treadway. Mr. Chairman and gentlemen, I do not want to appear before my colleagues as a witness, and I do not intend to do so. You have the measure before you. That tells the whole story.

Mr. Shallenberger. My thought in calling you, Mr. Treadway, was that we might possibly secure from you a brief explanation of the purposes of the bill.

Mr. Treadway. Perhaps it is proper that I should say a few words. Of course, I do not intend to enter into any argument with my colleagues.

Mr. Hill. If the gentleman will permit, it occurs to me that it might be more orderly for Mr. Treadway, as the author of the bill, to control the time, so far as the sponsorship of this particular legislation is concerned, and call the witnesses who are to appear in favor of the legislation.

Mr. TREADWAY. I should prefer not to. I am so intimately associated with you gentlemen on the committee that I have absolute and implicit confidence in your method and in your findings. I have no personal interest in this matter other than as a taxpayer in the State of Massachusetts.

Mr. HILL. I make the suggestion only in the interest of orderly procedure.

Mr. TREADWAY. I have made no arrangements with anyone to appear. I have asked nobody to come here. I did suggest to the chairman that the various State officials of those States other than the eight community property States, be notified of this hearing so that they might be represented. I understand that that has been done.

Mr. SHALLENBERGER. I will say, Mr. Treadway, that I had the clerk of the committee notify the secretary of state of every State of the Union.

Mr. TREADWAY. Then it is up to them to take such action as they may see fit. I have urged no one to appear as a witness.

May I say this, Mr. Chairman, that this subject has been before us for quite some time. It has been reported, I believe, in one or two measures. It is just a question of equity between States; whether by manipulation of local legislative enactments one State can take advantage in the matter of taxation over another, is all the question that is involved.

Eight States, a minority of the 48 States in the Union have a very distinct advantage over 40 other States. If that is fair and equitable, we should not legislate as proposed. If it is not fair and equitable, we should.

Of course, it is perfectly evident—and I think it is right and proper I should think they were derelict in their duty to their home communities, if they did not do so—that the representatives from those 8 community property States act as a body in opposition to the interests of the other 40 States. Whether you can interest the other 40 States to protect themselves, I do not know. As I have just said, I am not going to urge them to do so.

The amount of money involved here is something like $50,000,000 that other States are paying for the benefit of these eight. That is the whole story, gentlemen. There are 3 lawyers on your committee of 5. I should be presumptuous if I undertook to talk law to this committee. I have no desire to do so. Let me say that when our subcommittee started work last October on the subject of tax avoidance, this was one of the items that came up. We had the testimony and the opinion of our expert. Of course, he had to be discreet, as he is very capable of being. But in his honest judgment, it would appear that he feels that we are losing $50,000,000 that other States have to make up for the benefit of these eight States.

The treasury, through Mr. Magill, in an official statement on behalf of the Secretary of the Treasury, reiterated the statement that there should be legislation looking to an equalization of this amount of money.

You have the expert's opinion. You have a legal opinion from the counsel of the joint committee. You have the statement of the Secretary of the Treasury. Mr. Parker and Mr. Bartholow are here today to give you further details if you need them.

As far as I am concerned, I do not think there is anything further I have to say. I would ask permission to insert a table showing just how this affects the various States, to be made part of my remarks with perhaps any other slight extension as is usually accorded permission to do to any other witness appearing before the committee.

Mr. SHALLENBERGER. Without objection, the gentleman may extend his remarks as he has suggested.

Mr. TREADWAY. I want, perhaps, to add in closing that I was opposed to two features relating to the consideration of this proposed legislation. First I was opposed to not including this item in our general tax revision. I think it should have been in there, but I was voted down, and that is all part of the game. Originally, I believe, it was expected to include it in some way, but there was a change of sentiment in the Ways and Means Committee and it was then understood that it would be brought up as a separate measure. That is being done now. Later I opposed its being heard by a subcommittee. I felt that it was a matter of such great interest that it ought not to go to a subcommittee. But I am glad that it is in the hands of such a competent subcommittee as the one now having it in hand.

Of course, it is very unfortunate that anything as important as this is to the country, and particularly to the 40 other States, should come up so late in the session. It may be that it is not too late to correct such an apparent injustice, as I consider this to be. But even so, even if it is too late to bring it up now, so far as any action on it is concerned, the work of the subcommittee will not be lost service. While, with the change of political fortunes we may not all be here in the Seventy-fourth Congress, I have no doubt that the gentlemen who compose the subcommittee will return and, therefore, even though no definite results obtain from your labors at this time, it is desirable, I think, as a matter of record, that this hearing be conducted.

I thank you very much for your courtesy, gentlemen.

Mr. HILL. Before Mr. Treadway retires I should like to ask him a question.

Aside from the legal aspects of the question involved, which to my mind are conclusively against the legislation proposed, the matter of fairness and equity has been suggested by Mr. Treadway. I should like to make this observation in that connection, without going into detail, that the community property laws of these eight States in effect constitute the marital community a partnership; and it is decreed by law that the earnings of the marital community shall be owned equally by the two spouses.

Under this proposed legislation, the spouses in these community-property States would be denied the right of making returns on their individual incomes. In the State of Massachusetts, which is not a community-property State, and in many other States of the Union which are not community-property States, the laws of those States permit the husband and wife through voluntary contracts to enter into a partnership as to the earnings of their community or marital enterprises and to take advantage for tax purposes of that

arrangement, to make separate returns of their incomes. So that they get the benefit of a partnership enterprise which it is sought to deny to the spouses in community-property States, through this kind of legislation.

Mr. COCHRAN. Will the gentleman yield?

Mr. HILL. I yield.

Mr. COCHRAN. Is that the situation in all the 40 States that do not have community-property laws?

Mr. HILL. I am not sure as to how many States, but my information is probably 27 or 28 States. But all of the States could effect that kind of legislation and for the purpose of tax benefits in a number of States they have resorted to that kind of arrangement. And yet you would deny to our people, absolutely, by decree of a Federal statute, the opportunity that you give to these other States in that respect.

Mr. TREADWAY. I think that is all subject to very serious comment and exception. I certainly know something about returns in Massachusetts. I do not agree with my distinguished colleague on the method that he describes of making returns in that State. I am not familiar with methods in many other States, I will say.

Mr. HILL. I am not saying that they all do that. I am saying that they can do it and some do do it.

Mr. TREADWAY. There is another way. The 40 States, of course, could come to the 8 States and have the same type of legislation that the 8 States have, if that is proper. If that is the solution of the question, then it is simply another instance of the minority ruling again. You are asking the 40 States to arrange their legislation to correspond to that of the 8 States.

Mr. HILL. No; you misunderstand me. I am not asking it, I am not even suggesting it.

Mr. TREADWAY. That has been suggested.

Mr. HILL. Oh, it has been suggested.

Mr. TREADWAY. I think the Treasury suggested that very idea.

Mr. HILL. The fact that the other 40 States have not come to the community-property status would rather indicate that there are certain disadvantages in the community-property status which may offset any assumed advantages.

Mr. TREADWAY. I do not think that I agree with that, Mr. Hill. I think the fact that it has been nobody's business to pursue this idea accounts for the difference in the laws. In all of the States we are an entity to ourselves and legislate accordingly. It is simply because the individual States have had such a diversity of legislation. As Mr. Cochran just asked Mr. Hill whether the line of argument that Mr. Hill was making applied to all the States, there is such a diversity of legislation in the respective States that that accounts for the distinction that your 8 States are able to make and separate themselves from the other 40 in this matter of a return on incomes.

Of course, we can get into an interminable argument on this, Mr. Chairman, and that is just what I was trying to avoid.

Mr. HILL. There is just one other suggestion I want to make in connection with your statement, Mr. Treadway. The gentleman says that we are losing $50,000,000 by not enacting legislation as is proposed here; that if this legislation is enacted we would collect $50,000,000 from the eight community-property States. But there is nothing in the record that has been made heretofore, and no suggestion by the sponsors of this legislation as to how much tax money is being lost to the Government through arrangements between the spouses in States other than community-property States, whereby the spouses make separate returns instead of joint returns.

Mr. TREADWAY. I thank you, Mr. Chairman, for your courtesy.

Mr. SHALLENBERGER. We thank you for the information you have given us.

(Mr. Treadway submitted the following extension of his remarks:)

TAXATION OF COMMUNITY PROPERTY

Mr. TREADWAY. Mr. Chairman and colleagues, you are all familiar with the problem which is under consideration today, namely, the taxation of incomes of husbands and wives living in the eight States of the Union having the so-called "system of community property", under which all property acquired after marriage by either spouse becomes one half that of the husband and one half that of the wife. The States having this system are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

In these States, though all the income of the marital community is earned by the husband, each spouse may file a return of one half the income and thereby pay substantially less tax than married persons similarly situated in the other 40 States. It is estimated that approximately $50,000,000 of Federal income tax is legally avoided in this way. The bill which I have introduced seeks to correct this injustice by providing that, for the purpose of determining the income-tax liability of a taxpayer, property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse having the management and control thereof under the law of the jurisdiction in which the marital community exists.

The Supreme Court of the United States has held that as the income-tax liability of a taxpayer under the Federal revenue law is based upon ownership, it is proper for each spouse in a community-property State to return one half the community income. My bill makes the income-tax liability in these States depend not upon legal ownership but upon management and control. While we must concede that the Federal Government is bound by the property laws of the several States, and must therefore recognize that legal ownership of community property rests one half in each spouse, yet the fact is that the income in most cases is earned entirely by the husband, and he has entire dominion and control of the income and does not in fact share it equally with the wife. It is my contention that the legal fiction in the community-property States that the wife owns one half the husband's income should not be allowed to defeat the Federal income-tax laws.

Those representing community-property States will say that my bill is unconstitutional because it taxes one person on income that "legally" belongs to another. That, however, is a question which has not yet been directly passed upon by the Supreme Court. No Federal tax law has ever required community income to be included in a single return. It is true that the Court has nullified an attempt by the Bureau of Internal Revenue to require this by regulation, without specific authority of law, but it has never answered the direct question whether the Federal Government can look beyond the legal fiction laid down by State law and assess the income tax according to fact.

However, I do not wish to enter into a legal discussion of the matter, as I am not a lawyer. I would rather discuss only the practical aspects, leaving the legal phases to others.

I have stated that the Federal Government loses some $50,000,000 annually as a result of the community-property laws in the eight States referred to. If this money were collected from the taxpayers living in these States, the burden on taxpayers in the other 40 States could be lowered by this amount. All the States therefore have an interest in this matter.

It is plain that if the income tax were levied at a flat rate, there would be no saving by dividing an income into two portions for taxation purposes. However, under our graduated surtax, the rates progress by brackets as the

income increases. Let us suppose, for example, that John Doe and his wife, living in Massachusetts, have an income of $50,000, all earned by the husband. Under the present income-tax law, their tax would be $8,600. If, on the other hand, their income were double this amount, or $100,000, they would pay $30,100, or three and one half times as much. Thus it would be to their advantage if the $100,000 income could be taxed as two separate incomes.

Now, what is the situation in the community-property States? We will again suppose that the husband has an income of $100,000. Instead of reporting the entire income as his own, and paying a tax of $30,100, he and his wife each report $50,000, divide the exemption, and pay a combined tax of only $17,400. The saving by virtue of having their domicile in a community-property State is thus $12,700, or more than 40 percent of the basic tax. These amounts will, of course, be changed somewhat by the new revenue bill, but the proportionate saving will be substantially the same.

With the permission of the committee, I shall insert at this point a table showing the savings resulting to married persons living in community-property States, according to the amount of the net income. It will be noted that there is no saving at all where the income is $6.000 or less. This is because the graduated rates do not apply below this amount. However, beginning with incomes of $7,000, there is a substantial saving to all classes of taxpayers.

(The table is as follows:)

Tax advantage in community-property States

Net income of husband	Present tax in 40 States	Present combined tax on husband and wife in community-property States	Tax advantage	Proportion of tax saved
				Percent
$6,000	$140	$140	None	0.0
$7,000	210	180	$30	14.3
$8,000	300	220	80	26.6
$10,000	480	300	180	37.5
$20,000	1,680	1,160	520	30.9
$50,000	8,600	5,240	3,360	39.1
$100,000	30,100	17,400	12,700	42.2
$500,000	263,600	231,400	32,200	12.2
$1,000,000	571,100	527,400	43,700	7.9

I will say frankly that I was very much disappointed when the Ways and Means Committee failed to include in the revenue bill a provision relating to community incomes. That bill was for the avowed purpose of preventing tax avoidance, and it seems to me that it would have been particularly appropriate to have dealt with the subject at that time.

The members of the committee will all recall that we did tentatively approve of an amendment requiring husbands and wives in all States to file a joint return, and that this proposal was later dropped because of drafting difficulties and the so-called "Parker proposal", which my bill follows in principle, was then adopted. At the last minute, however, by a bare majority vote, this amendment was also eliminated, due to the opposition of members of the committee from community-property States and the apprehension of other Members that such controversial item might delay the passage of the revenue bill. At that time it was stated by the chairman that the community-property question would be taken up later as a separate bill, and this hearing is the result of that assurance.

The amendment which I propose to the revenue law is almost identical with that which appeared in the revenue bill of 1921. The House acted favorably upon the matter at that time, but the amendment was eliminated in the Senate and in conference the House conferees yielded in favor of the Senate action. A similar provision was favorably reported to the House in connection with the revenue bill of 1924, but was eliminated on the floor of the House by action of the committee.

Although during the present session consideration of the matter has been delayed until it is now almost too late to secure the enactment of any legislation, it is my hope that after full discussion of the subject the committee will

see fit to report a bill to the House which will have the effect of equalizing taxation throughout the United States by requiring husbands and wives in community property States to pay their fair share of the Federal income-tax burden. If this is done, the matter can be taken up again at the next session of Congress without further study.

Mr. SHALLENBERGER. Let me say a word about the calendar. I am arranging it to permit the experts from the departments to testify first. A number of Members of Congress have indicated they wanted to appear, but I do not think we can reach them this morning. We shall be glad to hear them tomorrow, however. Mr. Fulbright, who is located in Washington, is listed to appear, and we expect to hear from him tomorrow. My purpose is, in other words, to give those who have come a long distance an opportunity to be heard first, if it is of any convenience to them.

Mr. SUMNERS of Texas. Mr. Chairman, may I make an inquiry?

Mr. SHALLENBERGER. Certainly.

Mr. SUMNERS of Texas. Those who are opposing the bill have asked that I make some brief observations with reference to the constitutional questions involved. My own committee is meeting this morning. I assume from the chairman's statement that it probably will not be necessary for me to remain this morning.

Mr. SHALLENBERGER. We can hear the gentleman tomorrow, of course.

Mr. SUMNERS of Texas. I intend to be very brief in my remarks. As I understand it, the opponents would like me to make my remarks at the beginning of the presentation of the opposition to this proposed legislation. From what the chairman has just said, I assume that that will not come on until tomorrow, anyway.

Mr. SHALLENBERGER. That is correct.

Mr. SUMNERS of Texas. Then if I may be excused——

Mr. SHALLENBERGER. Yes; and we shall be glad to hear from you tomorrow.

I will call first Mr. Parker, from the Joint Committee on Internal Revenue Taxation.

STATEMENT OF LOVELL H. PARKER, CHIEF OF STAFF, JOINT COMMITTEE ON INTERNAL REVENUE TAXATION

Mr. PARKER. Mr. Chairman and gentlemen of the committee, I have only a very brief statement to make on this subject.

I should like to ask permission, however, to file with these brief remarks a memorandum prepared for the subcommittee of the Committee on Ways and Means which studied tax avoidance last fall, and also a letter from Mr. Prettyman, fomer general counsel of the Bureau of Internal Revenue. I think that those documents will be helpful to the committee.

Mr. SHALLENBERGER. We shall be glad to have those in the record, Mr. Parker.

(The documents referred to will be found at the conclusion of Mr. Parker's statement.)

Mr. PARKER. The bill which the committee is considering raises two questions. The first is whether it is proper as a matter of justice to tax income to the spouse having the management and control of the community property.

The second question is whether it is possible under the Constitution and the laws, to tax community income in that manner. Of course, both of those questions must be answered in the affirmative if anything is to be done with this matter.

The facts, I think, are fairly well known to the committee. There are eight community-property States, as Mr. Treadway has pointed out. There are three advantages to the residents of these community-property States: One, an income-tax advantage; second, an estate-tax advantage; and third, a gift-tax advantage.

As to the income-tax advantage, it only applies to taxpayers in the community-property States who have sufficient income to reach the surtax brackets. The small taxpayers, who simply pay the normal tax in community-property States, get no benefit. It does not make any difference whether they file separate or joint returns, because there is no difference in tax on account of the flat rate.

In the case of the estate tax and the gift tax, the rates are graduated all the way up. They do not have a flat normal tax plus a graduated system, so there is an advantage on those two types of taxes in practically all cases.

By advantage, I mean the tax benefit which results when you take a man in a non-community-property State and compare him with a man in a community-property State similarly situated from a practical standpoint. Mr. Hill might say that it is hard to bring about a similar situation, because under the community-property laws there is really a partnership existing. On that point I think it is important to bear in mind that there was great force to that argument prior to the Revenue Act of 1932, because in the non-community-property State, when we had no gift tax, a man, as far as the income from property is concerned, could put himself in the same position as a man in the community-property States, by giving his wife half of his property. That was not true prior to 1932 in respect to salaries. Of course, a man's salary in the non-community-property States never could be split between husband and wife, but the larger incomes, coming from investments, could be split.

Mr. Cochran. Simply by splitting the securities themselves?

Mr. Parker. There was no gift tax, and the husband could give his wife half his securities, and that put him in the same position as in a non-community-property State. Now, we have a gift tax and the pending bill provides for a very heavy gift tax.

Therefore, that method of equalizing the situation is no longer available.

Mr. Hill. Do you mind an interruption?

Mr. Parker. I am glad to be interrupted, Mr. Hill.

Mr. Hill. You say that he cannot form a partnership so far as the salary is concerned, but he could make a gift of property outside of salary to compensate for that, so that the income in the future would really be divided; there would be the separate income of the wife and she would get the advantage of that in future years.

Mr. Parker. He can get that advantage, but if it is a large amount he would pay for that advantage by paying a gift tax on the transfer.

Mr. Hill. If he gave her up to $5,000 a year, he would not pay a gift tax on it?

Mr. Parker. That is true. I was speaking of the large incomes which are particularly important to this matter on account of the surtax rates.

Mr. Shallenberger. Do I understand that under the present laws of these community-property States the salary of the husband cannot be divided?

Mr. Parker. The salary is divided in the community-property States, but it cannot be divided in the other States.

Mr. Shallenberger. I understand.

Mr. Cochran. I would like to ask you a question. This was brought up by Mr. Hill in his statement a moment ago in connection with the formation of partnerships between husband and wife in the non-community-property States. As I understood Mr. Hill, he did not go so far as to say that it could be done in every non-community-property State. What is your opinion as to that?

Mr. Parker. The husband and wife now, in most States—not all, but in most States—can go into partnership. If they both put in an equal amount of capital they can split the income from that partnership. But that is no advantage if they have the income anyway, for income-tax purposes.

Certain cases have been drawn to my attention where a husband has a business and has brought the wife into partnership and his wife does not put any money in. I know of one specific case where the Department would not permit that. They said that it looked colorable; that it was a case of tax avoidance. This man's wife had not contributed anything to the partnership, and just because he called her a partner, that did not give them the right to split that partnership income for tax purposes.

I remember another case on that point where a number of gentlemen brought their wives into partnership for the purpose of distributing the income. The Treasury ruled against that and would not permit it for tax purposes.

There is only one other point in the matter of income tax. It is not of great importance, but still it raises a question. We had in the 1928 act an earned-income provision that permitted a certain relief from taxation in the case of earned income. The income was recognized as earned income only up to $30,000.

In a community-property State, if a man got a salary of $60,000, the man and his wife both were allowed $30,000 of earned income each. Under the Revenue Act of 1934, which is now pending, income is recognized as earned up to $14,000. If it is allowed on two returns, it would come up to $28,000 in the case of community-property States.

Mr. Hill. On that point, Mr. Parker, that is subject of proof, as to whether it is earned income above $3,000.

Mr. Parker. Yes; that is true. But I am assuming that if a man in New York, for instance, received a salary of $28,000, he would be permitted to recognize only $14,000 of that as earned income on his income-tax return. If a man in California received a $28,000 salary, you take up $14,000 of that on his return and the whole $14,000 would be recognized as earned. His wife would take up $14,000 and that $14,000 would also be recognized as earned.

So that in California the whole $28,000 is recognized as earned.

Mr. Hill. That is, if the spouse were able to establish the fact that $14,000 of it was earned income.

Mr. Parker. Well, there would not be any question about it on a straight salary, I presume.

Mr. Frear. How would the wife be getting the salary? Would she have to get it from an employer, or would it just be simply a provision of law whereby half of the husband's income was regarded as hers?

Mr. Parker. No. The law contemplates, as I understand the community-property law, that the husband and wife both earn that money and have an equal right in that salary. Therefore, as far as they are concerned, it is salary to both of them.

Mr. Frear. You are speaking now of community-property States?

Mr. Parker. Yes, Mr. Frear.

Mr. Frear. Even though the salary is all paid to the husband?

Mr. Parker. It does not make any difference.

Mr. Frear. I am trying to find out about the matter of earned income, so far as the wife is concerned. It is counted as earned income of the wife notwithstanding that the money is paid to the husband?

Mr. Parker. The law says that she earns it. She does her necessary part at home. That is the community-property theory—and there is no quarrel with it—it is an old theory and goes back a good many centuries. France followed such a system, as did Spain. I believe it originated with the Goths in Germany. And the theory was that the wife was recognized as equally important in the earning of the community income though her duties were performed at home.

Now, as to the estate tax, there again the revenue bill of 1934 provides increases which average about 40 percent in the estate-tax burden. Of course, as we have a graduated scale of rates, that makes a very considerable difference in the total estate tax in the non-community-property States in comparison with the community-property States.

However, it should not be overlooked, in fairness to the community-property side of the question, that if the husband in a non-community-property State has all the property and dies, his tax will be considerably more, of course, than a man that has accumulated that wealth in a community-property State where it is divided in half. However, we get the tax on both halves in the community-property Sates. That is to say, when the husband dies in a community-property State, we get an estate tax. When his wife dies, we will get another tax from her. Whereas in the non-community-property States, if the husband and wife die within 5 years of each other, there will be only one tax.

Mr. Frear. It does not reach the same high bracket?

Mr. Parker. It does not reach the same high bracket. It is offset, though, because of the fact that both of them are taxed. It is unnecessary to comment on the gift tax as exactly the same situation exists and the rates of that tax will also be substantially increased on the passage of the pending revenue bill.

As to the legal questions, there is a great deal of controversy. Able lawyers believe that it is possible to tax this community income. Other able lawyers believe it is not possible to do so. My personal opinion is that if we could bring that question to the Supreme Court without jeopardizing our revenue, it might be well. What I mean is, we must watch the statute of limitations. If we are going to try to tax community-property income, it will become very necessary to do something about the statute of limitations, because we will require these people to include the income on one return. They will probably include it in their return under protest and pay the tax under protest. The case will go up and be decided. Let us say the Government loses. Then the statute of limitations may have run against collecting the tax on the separate returns and we will lose half of the tax we get under existing law.

I would suggest, therefore, that the committee, if they consider reporting this bill, also consider that question, as it might properly be included in the legislation.

Mr. Frear. Would you be willing to place in the record at this point such a proposed amendment to this bill, so that we may understand the scope of it?

Mr. Parker. I could possibly in a couple of days offer such an amendment.

Mr. Frear. Will you do that?

Mr. Parker. Yes, sir.

(The amendment is as follows:)

Add at the end of the bill a new sentence reading as follows:

For the first taxable year beginning after December 31, 1933, the periods of limitation for assessment, credit, or refund of income taxes shall be extended for a period of 1 additional year in the case of any individual having such management and control or in the case of his or her spouse.

Mr. Shallenberger. Mr. Parker, when you said that some thought it was possible and some thought it was not possible to enact this legislation, you were referring to the question of constitutionality that might be involved?

Mr. Parker. That is right. That brings me to the legal side of this question, and on that point, with the permission of the committee, I should like to have Mr. Stam, counsel of the joint committee, make a statement, as he has the cases much better in mind than I.

Mr. Frear. Before you leave the stand, I would like to get clear in the record, if I can, this matter of the $50,000,000 that has been referred to first on one side and then on the other as being involved. If I remember correctly, the Treasury Department estimated as high as $60,000,000. I do not remember where that statement came from, but I think it came before one of the subcommittees. Can you give us for the record so that we may have it clearly here, where that loss comes about, if it is a loss, or where that discrimination comes about, if it is a discrimination?

Mr. Parker. The estimate is of an amount which we would gain by taxing the community-property income to the spouse having the management and control of the property. Various estimates have been made on that, and quite properly so, because the estimate depends on the prosperity of the country, on the income of the country. Our income tax is very unstable. We have had fluctuations of 50 and 75 percent. Therefore you must expect, if you want a general view of the situation, fluctuations in the estimates. I believe that the gain in revenue under this bill would be somewhere between 30

and 50 million dollars. The 50-million-dollar figure would come in in a prosperous year, when the incomes in those States were high, and the 30-million-dollar figure would come in when they were somewhat subnormal.

Mr. Frear. With what degree of accuracy is that estimate made?

Mr. Parker. We have statistics of income showing income tax reported by all the individuals by brackets, not only from the United States as a whole but from every State in the Union segregated. That enables us to take those 8 community-property States and examine them in the light of what we get from the other 40 States. Of course, a fairly sound basis of estimate can be arrived at from those figures.

Mr. Frear. The Treasury Department, as I recollect, came to a little different understanding or conclusion. I have forgotten whether that was to have all the States adopt community-property laws, or the other way around.

Mr. Parker. No. The Treasury proposed to make it mandatory in all 48 States for a husband and wife to file a joint return. Of course, that would substantially increase the revenue, substantially increase it in the case of community-property States, and considerably increase the revenue in the other 40 States.

Mr. Frear. What would be the difference in the result between that proposal and that in the bill?

Mr. Parker. I should think that the Treasury proposal would have produced at least $25,000,000 annually more than this present proposal, with the same rates. Of course, if you want to make adjustments in rates, it is possible to cut that $25,000,000 off—that is, if you do not want to increase taxes substantially in the non-community-property States.

Mr. Hill. I just want to ask one question. This estimate of $50,000,000, or whatever it is, that you claim that you would collect from the community-property States in event legislation such as this before us were enacted, would that not be a discrimination against the community-property States, in this, that in the non-community-property States and in these States of the non-community-property States under whose laws voluntary contracts may be entered into by husband and wife for the formation of partnerships, for the purpose, among other things, of securing benefits in taxation—would they not have an advantage over the community-property States, if this legislation were enacted?

Mr. Parker. I believe your point is well taken. I believe there would be some discrimination. I doubt if this language would make the husband include in his income, even though he managed the partnership, that share of the income that went to his wife. But, of course, I think the Treasury in those cases would make the wife actually receive the income—that is, require that the wife actually receive it. I do not think they would allow the law to be evaded by allowing the husband to keep all of that income. Of course, in the community-property States, I do not think on the average that a man turns one half of his salary over to his wife, whereas in this partnership situation, the man really would have to turn that income over to his wife.

Mr. Hill. Is it not true that under these partnerships between husband and wife in the non-community-property States now, they

are getting the benefit of these separate returns in their tax payments?

Mr. Parker. They would get it, and I think properly so, if the wife has really contributed substantially through investment in that partnership. But, as I said a minute ago, I do not think the Treasury would recognize mere fictitious paper partnerships, where the wife put in no property and rendered no service. It would not allow them to split the income by mere contract. I do not think the Treasury would permit that. I do not think the court would sustain such a contract.

Mr. Hill. The status of community property in community-property States, is fixed by law. It is not a voluntary arrangement between the spouses. You say to them that it must be returned in one tax return and that by the spouse having the management or control of the property. Yet in the noncommunity-property States a legal arrangement under the laws of the State may be effected creating a partnership between husband and wife and thereby they can get the benefit of separate returns of income from that partnership.

Mr. Parker. Of course, in a community-property State where the husband and wife had separate property I still think that they could put in an equal amount of the separate property into a partnership and operate it and get income from it and file separate returns.

Mr. Hill. As to the separate property.

Mr. Parker. Yes, sir.

Mr. Hill. But not as to the community property?

Mr. Parker. No; not as to the community property.

Mr. Hill. But there is no such restriction in the non-community-property States. They can put in all their property if they want to.

Mr. Parker. That is correct.

Mr. Shallenberger. I want to get straight on one question. The bill provides, does it not, that in every State, community-property States as well as those that are not community-property States, they shall be required to make one return. That is the provision in this bill?

Mr. Parker. This provides that the income——

Mr. Shallenberger. It does not separate the different States between community property and noncommunity property?

Mr. Parker. This provides that the income of a marital community shall be considered as the income of the spouse who has management and control thereof. Of course, the trouble is it does not mention the community-property States, but we know what this term "marital community" means. We know what community property is. In the other States there really is no such thing.

Mr. Hill. We know that there are community-property States now and this bill is intended to apply to those eight community-property States. We know that, do we not?

Mr. Parker. I do not think there is any doubt about that. The language does not say it, but it is evident.

Mr. Shallenberger. But does it not also apply to the other States that are not community-property States?

Mr. PARKER. I think it might apply in certain cases, but I think they would be very rare.

Mr. HILL. Will you give us an illustration where it might apply in non-community-property States?

Mr. PARKER. I think if a man took his wife into partnership and provided in the contract that the income from the partnership should be considered as belonging to the marital community with the man in control of such income, the courts might hold that the spouse had the management and control and it was a marital community they had set up, and it might apply.

Mr. SUMNERS. Mr. Chairman, may I ask the witness a question? Is that permitted under the rules of the committee?

Mr. HILL. It is not usually permitted, may I say to the gentleman, but so far as I am concerned, I should be glad to have him ask the question.

Mr. SUMNERS. May I suggest, then, that the gentleman ask this question of the witness? May I suggest you ask this concrete question? If this bill is passed, and there is a partnership operating in Texas between a man and his wife, and another partnership operating in Massachusetts between a man and his wife, would the earnings from the partnership in each instance be incorporated in a separate return or would they be incorporated in a single return in Texas and would they be allowed to split it in Massachusetts?

Mr. SHALLENBERGER. That is just what I was trying to bring out.

Mr. SUMNERS. I know you are, and that is why I wanted to ask that concrete question.

Mr. FREAR. It seems to me that that is only part of the question.

Mr. HILL. May I suggest that the witness be allowed to answer that part of it first?

Mr. PARKER. I am afraid that I will have to counter with a question before I can answer that one. Undoubtedly you are more familiar with the laws of Texas than I am. Do you assume that this partnership in Texas is community property or was the partnership formed or were the assets of this partnership taken from separate property of each one of the partners, the man and the wife?

Mr. SUMNERS. The earnings would be community property. It does not make any difference what they do about it. In other words, it does not make any difference what they do. They cannot do anything under the laws of Texas to prevent the earnings from that property from becoming community property.

Mr. FREAR. That includes the salaries and all?

Mr. SUMNERS. Everything. My question was, if the bill is passed, in a situation such as I have indicated with regard to Texas, which is a typical community-property State, and a partnership in Massachusetts, which is a non-community-property State, would the income in Massachusetts from the partnership and the income from the partnership between the husband and wife in Texas bear the same relative burden insofar as supporting the Federal Treasury is concerned?

Mr. PARKER. No. I think Texas would be at a disadvantage in that case, if I recall correctly. I do not think all the States are the same as Texas on that point.

Mr. HILL. It is the noncommunity State partnership which would get the advantage?

Mr. PARKER. I think there are some inequalities that would arise.

Mr. FREAR. How could that be adjusted to make it more equitable? Would it be by administrative action by the Treasury Department?

Mr. PARKER. No. If the committee thinks well of this bill, the theory of this bill is that the Federal Government's income-tax law is going to override the property laws of the States and the Federal Government would say to the States, "We cannot help it if you have peculiar laws; we are not going to pay any attention to them."

Mr. HILL. You are touching on a vital point.

Mr. PARKER. Either the property laws of the States are going to be paramount or those of the Federal Government. I cannot claim that there would not be some inequalties.

Mr. FREAR. In the case you have mentioned, where the State with the community-property law is placed in a disadvantage, how could that be adjusted so as to make it common in both classes of States, those which have community-property laws today and those which have not?

Mr. PARKER. I suppose we could build up something to take care of that. I cannot state offhand what could be done. Probably we could draft some special provisions. We had a provision in the revenue bill of 1934 and we found that it did not work equally in all States, and we changed the provision so as to make it work uniformly.

Mr. FREAR. What would be the result?

Mr. PARKER. If all the States had the community laws we would have to raise the rates of tax.

Mr. FREAR. Is there any particular variation in the States as to the effect of the law, the community-tax law, so far as you are aware?

Mr. PARKER. No; I think not. There was originally in the case of California, but California has since changed its constitution.

Mr. HILL. In the illustration that Chairman Sumners, of the Judiciary Committee, propounded, I understood him to say that all income from husband and wife in the State of Texas, whether from separate property or from community property, was considered community income?

Mr. SUMNERS. That is almost true.

Mr. HILL. There would be a discrimination as between the community-property States in that regard?

Mr. PARKER. That is correct.

Mr. SUMNERS. When I spoke of the partnerships in Texas, I did not speak of technical partnerships. We do not recognize copartnerships as between husband and wife.

Mr. FREAR. That is, like they do in noncommunity States. We have to be educated along some of these lines; it is an involved subject.

Mr. SHALLENBERGER. We have here the counsel for the Joint Committee on Taxation.

(The following documents were submitted by Mr. Parker and by the chairman ordered incorporated in the record:)

Memorandum on Federal Taxation of Community Property and Community Property Income

Eight States—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—have community-property laws. The residents of such States, if married, enjoy substantial advantages over the married residents of all the other States (in cases where such residents have substantial amounts of property or income) in respect to the Federal income, estate, and gift taxes. These advantages may be described as follows:

1. Income-tax advantage

The husband and wife in a community-property State by filing separate returns pay substantially less income tax than a husband and wife similarly situated in a non-community-property State where the net income is greater than that included within the first income-tax bracket for normal tax purposes.

For instance, suppose a married man with no dependents has a net income derived from salary of $100,000. His tax in a non-community-property State amounts to $30,100. In a community-property State, however, the husband's salary may be divided between the husband and wife and reported on separate returns, in which case the total tax shown on both returns will amount to only $17,400. That is, in the non-community-property State, the total tax in this case is 73 percent more than in the community-property State. The same result obtains in the case of interest received on community property, and a similar result in the case of dividend income.

One phase of this advantage is not generally understood; i.e., the fact that it is confined principally to the persons with substantial incomes. This can be brought out by the following table for the case of a married man with no dependents:

Net income	Total tax, non-community-property State	Total tax, community-property State	Percentage excess of tax in non-community-property State
$3,000	$20	$20	0
$4,000	60	60	0
$5,000	100	100	0
$6.000	140	140	0
$7,000	210	180	17
$8,000	300	220	36
$10.000	480	300	60
$20,000	1, 680	1, 160	45
$50,000	8, 600	5, 240	64
$100,000	30, 100	17, 400	73
$500,000	263, 600	231, 400	14
$1,000,000	571, 100	527, 400	8
$10,000,000	6, 241, 100	6, 182, 400	1

The above table is computed under the rates imposed by the Revenue Act of 1932, however, the relation between the tax in the non-community- and community-property States is not substantially changed by the rates in the revenue bill of 1934.

The table brings out some important facts which can be used to refute arguments advanced in favor of permitting a lesser tax in community-property States. For instance, it is often said that the tax reduction is fair enough in view of the disadvantages suffered by a man in a community-property State. How can this be true when it is realized that only more prosperous individuals secure any tax relief under our present system in these community-property States? If tax relief is justified, why should not all taxpayers, rich or poor, be entitled to proportionate tax reductions? This is not the case. For instance, in 1930 the total number of taxable returns filed in the State of Washington amounted to 33,814. Of these, 18,927 showed net incomes of less than $4,000; 8,308, net incomes of from $4,000 to $6,000; 6,545, net incomes of from $6,000 to $100,000; and 34, net incomes of over $100,000. In view of these figures and making allowances for the returns of single persons, it is believed that material advantage accrues to less than 20 percent of the income-tax payers of Washington. However, when the benefit is secured, it is substantial and seriously affects the Federal revenue.

Further income-tax advantage may also accrue to the residents of the community-property States in the case of losses on sales of property due to allocation on the separate returns of such losses. A substantial advantage also existed under prior laws and will exist with the passage of the revenue bill of 1934 in connection with the earned-income credit, for in community-property, States the limit to which earned income was recognized was $60,000 against $30,000 in the non-community-property States under the Revenue Act of 1928, and will be $28,000 against $14,000 under the revenue bill of 1934.

2. Estate-tax advantage

The husband and wife with substantial property in a community-property State also enjoy a great advantage over married persons in other States in that there is no estate tax imposed on one half of the property of the husband acquired after marriage and passing to the wife.

For instance, suppose we have a man, wife, and son living in a community-property State. Assume the man has accumulated $2,000,000. On his death $1,000,000 passes to the wife without tax and there will be a tax of $117,500 on the $1,000,000 passing to the son. If the wife now dies, there will be a tax of $117,500 on her estate passing to the son. The total estate tax, then, on $2,000,000 passing eventually to the son will be $235,000 in a community-property State. On the other hand, in a non-community-property State there will be an estate tax of $315,500 collected on the death of the husband. If the widow receives $1,000,000 of the estate and she dies after 5 years, leaving her property to the son, there will be a further tax of $117,500. Therefore the total tax in a non-community-property State in such a case is $433,000 against $235,000 in a community-property State; that is, there is 84 percent more tax collected in the non-community-property State.

The following table compares the amount of tax paid by the estate of the husband only in a non-community-property State with the amount of tax paid by both the estate of husband and wife in a community-property State:

Net value of property accumulated by husband	Estate tax, non-community-property State	Tax on estate of both husband and wife, community-property State	Percentage excess tax in non-community-property State
$200,000	$9, 500	$3, 000	217
$400,000	30, 500	19, 000	61
$800,000	84, 500	61, 000	39
$1,000,000	117, 500	85, 000	38
$4,000,000	831, 500	631, 000	32
$10,000,000	3, 094, 500	2, 299, 000	34
$100,000,000	43, 593, 500	42, 187, 000	3

All of the above estate taxes are computed under the rates imposed by the Revenue Acts of 1926 and 1932. The pending revenue bill of 1934 increases estate tax rates 40 percent on the average. Therefore, the existing inequalities will be accentuated in the future.

It cannot be denied that the estate tax is a much greater burden in States not having community-property laws. It should also be observed, since the Federal estate tax applies only to estates with a net value of more than $50,000, that, as is the case with the income tax, no advantage accrues to the great mass of residents of the community-property States since obviously their estates are less than $50,000.

3. Gift tax advantage

Under all our prior revenue acts except the 1924 act, the residents of non-community-property States were able to put themselves in the same position in regard to the estate tax as was the case in the non-community-property States, by giving one half their property to their wives before death. The 1932 act, however, takes away this opportunity by imposing a gift tax.

For instance, under existing law, if a man in a community-property State wants to turn over one half of the community property to his wife to enjoy

as she sees fit, there will be no tax. In a non-community-property State, however, there will be substantial tax, as shown by the following table:

Amount of gift (in excess of exemption of $50,000):	*Gift tax*
$100,000	$3,625
$400,000	26,125
$1,000,000	92,125
$10,000,000	2,312,125

These computations are made under the rates imposed by the Revenue Act of 1932. Since gift taxes will be increased approximately 40 percent by the revenue bill of 1934, the situation will become even more inequitable.

As was the case with the Federal income and estate tax, this gift tax advantage is of no value to the average citizen of the community property State, since gifts totaling less than $50,000 are exempt from the Federal tax.

In view of the substantially greater income, estate and gift taxes paid in the non-community-property States as already outlined, it is the opinion of this office that an inequality exists which should be eliminated or at least partially offset.

PROPOSALS FOR REVISING FEDERAL TAX ON COMMUNITY PROPERTY

It appears that two proposals may be considered in connection with the inequality pointed out existing between community-property and non-community-property States in the case of the income tax. The first of these proposals is to attempt by law to force the inclusion of community-property income in the husband's return. The second proposal is a mathematical proposition which attempts to equalize the situation in part by an increased personal exemption on the joint return of husband and wife based on a percentage of the net income. These proposals will now be discussed.

Proposal no. 1.—In the opinion of this office, the existing law may be changed so that the husband will be required to report in his income-tax return and pay a tax on all the community-property income without incurring undue risk of having such a provision declared unconstitutional. It is believed that this could be accomplished by including in the definition of gross income a provision in substance as follows:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property."

It might be argued that Congress has no power to require the husband to include in his return the wife's portion of the community income. But this question has never been passed upon by the Supreme Court. In fact, it appears from certain statements made in opinions by the Supreme Court upon the community-property situation that such a provision would be within the power of Congress. The leading case on community property is that of *Poe* v. *Seaborn* (282 U.S. 181). In that case, both the husband and wife were residents of the State of Washington and the Government sought to require the husband to include all of the community income in his separate return. The court, in denying the right of the Government to force the husband to include in his income his wife's share of the community income, based its decision upon statutory and not upon constitutional grounds. This is brought out by the following:

(1) The court stated that the case required a construction of sections 210(a) and 211(a) of the Revenue Act of 1926, which lay a tax "upon the net income of every individual." In this connection, the court made the following statement:

"The act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase."

(2) The Government argued that management and control by the husband was sufficient to permit the taxing of all the community income to him. But this contention was denied, because the court held that under the statute the test of taxability is "ownership" and not management and control.

(3) In regard to the legislative history, the court made the following comment:

"On the whole, we feel that, were the matter less clear than we think it is, on the words of the income-tax law as applied to the situation in Washington, we should be constrained to follow the long and unbroken line of executive construction, applicable to words which Congress repeatedly reemployed in acts passed subsequent to such construction (citing authorities), reenforced, as it is, by Congress' refusal to change the wording of the acts to make community income in States whose law is like that of Washington returnable as the husband's income."

(4) In distinguishing the Corliss case from the case of *Poe* v. *Seaborn*, the court made the following comment:

"The Corliss case raised no issue as to the intent of Congress, but as to its power. * * *"

In view of the legislative history of the community-property situation, it is not believed that the court could have held otherwise. It appears that in the 1921 revenue bill the House inserted a provision reading as follows:

"Income received by any community shall be included in the gross income of the spouse having the management and control of the community property."

This provision was contained in the bill as it passed the House, but was stricken out by the Senate, as shown by the following statement contained in the conference report:

"Amendment no. 134: The House bill provided that income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property. The Senate amendment strikes out this provision; and the House recedes."

When the 1924 act was introduced, it contained a similar provision, which was stricken out by the Ways and Means Committee. This legislative history clearly shows that Congress did not intend to require the wife's portion of the community income to be returned by the husband.

It is believed that a careful reading of the *Poe* v. *Seaborn Case* will show that the court in that case was not dealing with the power of Congress to tax community income to the husband, but with the question of whether Congress intended to tax such income to the husband. As pointed out above, the legislative history indicates that Congress had no such intention under existing law. While the case of *Poe* v. *Seaborn* related to the community property situation in the State of Washington, similar conclusions were reached by the Supreme Court in the case of the community property situation in Arizona, California, Louisiana, and Texas. (See *Goodell* v. *Koch*, 282 U.S. 118; *United States* v. *Malcolm*, 282 U.S. 792; *Bender* v. *Pfaff*, 282 U. S. 127; and *Hopkins* v. *Bacon*, 282 U.S. 122.)

It is accordingly the opinion of this office that there is a strong possibility that the Supreme Court will uphold a provision taxing all community income to the spouse having control and management of the property.

Proposal no. 2.—By a mathematical device in connection with the personal exemption, the inequality in tax between married persons in the community and noncommunity property States can be considerably reduced.

For instance, a fixed personal exemption of $1,000 might be allowed on all separate returns, but on the joint return of a husband and wife, in which the income of both is taxed as a unit, an exemption of $2,250 plus 10 percent of the amount of the net income might be allowed. These exemptions should be allowed for both normal and surtax purposes and the present rate schedules adjusted in order not to affect the revenue too greatly.

In order to illustrate what can be done in this direction, the writer has used the exemptions above stated and with an adjusted rate schedule has computed the following table showing present and proposed taxes in the noncommunity and community property States:

Net income	Present law		Proposed revision	
	Total tax noncommunity States	Total tax community States	Total tax noncommunity States	Total tax community States
$1,000	$0	$0	$0.00	$0
$1,500	0	0	0.00	0
$2,000	0	0	0.00	0
$2,500	0	0	0.00	20
$3,000	20	20	18.00	40
$3,500	40	40	36.00	60
$4,000	60	60	54.00	80
$5,000	100	100	90.00	120
$6,000	140	140	126.00	160

Net income	Present law		Proposed revision	
	Total tax non-community States	Total tax community States	Total tax non-community States	Total tax community States
$7,000	$210	$180	$164.00	$200
$8,000	300	220	236.00	240
$9,000	390	260	316.00	280
$10,000	480	300	380.50	320
$12,000	680	440	555.00	480
$14,000	900	620	742.00	640
$16,000	1,140	800	958.00	820
$18,000	1,400	980	1,174.00	1,000
$20,000	1,680	1,160	1,442.50	1,200
$25,000	2,520	1,670	2,130.00	1,760
$30,000	3,480	2,240	3,030.00	2,360
$35,000	4,590	2,870	3,930.00	3,110
$40,000	5,800	3,560	5,092.50	3,860
$45,000	7,140	4,370	6,307.50	4,760
$50,000	8,600	5,240	7,522.50	5,760
$60,000	11,900	7,160	10,127.50	7,760
$70,000	15,700	9,380	13,457.50	10,320
$80,000	20,000	11,800	16,787.50	13,020
$90,000	24,800	14,480	20,755.00	15,720
$100,000	30,100	17,400	25,615.00	18,420
$150,000	58,100	35,780	50,897.50	36,720
$200,000	86,600	60,400	76,547.50	63,380
$300,000	144,600	116,400	127,847.50	120,320
$400,000	203,600	173,400	179,147.50	177,320
$500,000	263,600	231,400	230,447.50	234,320
$750,000	416,200	377,900	363,880.00	376,820
$1,000,000	571,100	527,400	498,880.00	519,320
$2,000,000	1,201,100	1,142,400	1,062,812.50	1,119,260
$5,000,000	3,091,100	3,032,400	2,763,812.50	3,009,200
$10,000,000	6,241,100	6,182,400	5,598,812.50	6,159,200

In the above table, column 1 represents the net income of the husband in the non-community-property States and the combined community-property income of the husband and wife in the community-property States. Column 2 represents the present tax on a married man with no dependents on such income in a non-community-property State. Column 3 represents the present tax on a married man with no dependents on such income in a community-property State where separate returns are filed, as, of course, they uniformly are where there is a tax advantage. Column 4 represents the proposed tax in the case of joint return in a non-community-property State, or, for that matter, in a community-property State if a joint return is used. Column 5 represents the proposed tax in the community-property States in the case of separate returns.

The following facts should be noted from the data given in the table:

First. The tax on the joint returns under the proposed method somewhat reduces the present tax in the non-community-property States.

Second. The tax on the separate returns under the proposed method somewhat increases the present tax in the community-property States except in the case of incomes of more than $500,000. (So few returns exist of over $500,000 that this exception is not important from a revenue standpoint.)

Third. It results from the first and second propositions above that the existing inequalities in tax between the community- and non-community-property States are considerably reduced.

Fourth. The fact that the total proposed tax on the separate returns in the community-property States is greater than the total tax on the joint returns in the other States, in certain instances, is not important, since the residents of the community-property States have the privilege of filing point returns and reducing their tax to the same amount as paid by residents of the other States.

The result of this system would reduce the present inequality in tax, as shown in the following table:

Net income	Present excess tax in noncommunity States	Proposed excess tax in noncommunity States
$7,000	$30	----------
10,000	180	$60.50
20,000	520	242.50
30,000	1,240	670.00
50,000	3,360	1,762.50
100,000	12,700	7,195.00
200,000	26,200	13,167.50
500,000	32,200	----------
1,000,000	43,700	----------

It can be seen from the above that existing inequalities are reduced more than 50 percent on the average.

It is true that the particular rates selected reduce the tax on the married man in the noncommunity States. This might have some effect on the revenue It is also true that the adjustment of rates would slightly increase the tax or single persons in all the States, as shown by the following figures:

Net income	Present tax, single person	Proposed tax, single person
$1,000	$0	$0
2,000	20	20
5,000	120	120
10,000	600	600
20,000	1,800	1,930
50,000	8,720	9,210
100,000	30,220	31,690
200,000	86,720	88,660
500,000	263,720	259,660
1,000,000	571,220	559,630

It will be noted that there is no increase in the taxes of the single persons except in the case of the larger incomes. It is believed that in these cases the slightly larger tax can be readily borne. In this connection, it might be pointed out that the present difference in the tax on married and single persons with like income is negligible under present law.

For instance, under present law, a single man with a net income of $100,000 pays $30,220 in tax, while the married man pays $30,100—a difference of only $120. This is the maximum difference no matter how great the income. As a practical matter, it seems obvious that this slight difference in tax does not conform to the principle of "ability to pay." Under the tentative rates proposed, a single man with $100,000 net income would pay a tax of $31,690 and a married man with a like income, $25,615. From many considerations, this difference of $6,000 in tax does not seem unreasonable, although, of course, the question is a matter of judgment. It seems probable that many will be of the opinion that a single man, who has $68,310 left after payment of taxes is better off than a married man who has $74,385 left after payment of taxes.

The particular rates selected for the explanation of this proposal can, of course, be revised to secure results in keeping with the desires of the Congress. The important question is whether or not this method is worthy of consideration.

PROPOSALS IN THE CASE OF THE ESTATE AND GIFT TAXES

Similar propositions can be advanced for remedying the community-property situation in the case of the estate and gift taxes, although it might be wise to leave these revisions until after some income-tax proposal has been actually tried out.

In the case of the estate and gift taxes, both of which are excises, it might be possible to levy a tax on the transfer of the management and control of community property. On the other hand, if it is desired to equalize only partially the inequality, a specific exemption to the wife might be provided in the case of these taxes. It seems better not to develop these propositions here, until the proposals suggested in the case of the income tax are analyzed and discussed.

CONCLUSION

This memorandum has been prepared in order that the community-property situation in respect to Federal taxation might be considered in its general aspects. It appears that the revenues are reduced $30,000,000 to $50,000,000 on account of the present situation in respect to the taxation of community property and the income therefrom.

Respectfully submitted.

L. H. PARKER, *Chief of Staff,*
Joint Committee on Internal Revenue Taxation.

DECEMBER 15, 1933.

Mr. L. H. PARKER,
Chief of Staff, Joint Committee on Internal Revenue Taxation:

Reference is made to your letter of September 26, 1933, submitting for criticism, comment, and further suggestion a memorandum prepared by the staff of the Joint Committee on Internal Revenue Taxation relative to the taxation by the Federal Government of community income.

This office is in complete agreement with your conclusion that effort should be made during the coming session of Congress to remove the inequities, so thoroughly illustrated by the tables in your memorandum, which result from the fact that the taxpayers of the eight community-property States, whose incomes fall within the higher normal tax bracket, and subject to surtax in most instances as well, may divide the so-called "community income" into separate returns and thus accomplish material income-tax avoidance not possible for taxpayers similarly situated, with respect to amount of income, in the other 40 States. You have also pointed out the discrimination in estate- and gift-tax liability.

You have submitted two proposals:

Proposal no. 1.—To include in the definition of gross income a provision in substance as follows:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property", or—

Proposal no. 2.—A mathematical device under which, for example, a fixed personal exemption of $1,000 might be allowed on all separate returns, but on the joint return of a husband and wife, in which the income of both is taxed as a unit, an exemption of $2,250 plus 10 percent of the amount of the net income might be allowed for both normal and surtax purposes and the present rate schedules adjusted in order not to affect the revenue too greatly.

While the second proposal above set forth has considerable merit, it would appear to be open to the objections (1) that, although diminishing existing inequalities to some extent, it would still afford husbands and wives domiciled in community-property States considerable tax advantages over husbands and wives domiciled in non-community-property States, and (2) seems designed to result in such loss of revenues as would cause Congress to reject it at this time.

The first proposal submitted has in its favor the declaration of the Supreme Court of the United States in the Robbins case (269 U.S. 315) that:

"Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, *it does not follow that Congress could not tax the* husband for the whole." (Italics supplied.)

The later decision of *Poe* v. *Seaborn* (282 U.S. 181) can scarcely be said to go so far as to hold that Congress lacks the power to tax community income to the husband. In that case it was held that the particular revenue act then before the court (Revenue Act of 1926) did not disclose any intent on the part of Congress so to tax community income. It must, of course, be remembered that the Robbins case involved only community property which was acquired under the laws of California as they existed before 1917, and in which

the wife had no vested interest, only an expectancy. It is probable, therefore, that the court is free now to adopt a different view without repudiating its decision in that case. There is also the decision in *Hoeper* v. *Tax Commission* (284 U.S. 206) to consider. That case dealt with the Wisconsin income-tax law, which authorized assessment against the husband of a tax based on a total of the husband's and wife's incomes. Provision was then made for payment by the husband and wife in the proportion that the income of each bore to the combined income. Tax on the combined income was assessed against the husband. This rule operated, of course, to put the combined income in the higher tax brackets. In an opinion written by Justice Roberts it is said:

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's property or income by reference to the property or income of an other in contrary to due process of law as guaranteed by the fourteenth amendment * * *.

* * * * * * *

"* * * What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes."

Earlier decisions of the court, which contain pronouncements as to the nature of community property (*Warburton* v. *White*, 176 U.S. 484, and *Arnett* v. *Reade*, 220 U.S. 311), may present some difficulties. In those cases the court declared that the control which the husband exercised over community property was based not upon his exclusive ownership "but because by law he was created *the agent of the community*." The case of *Warburton* v. *White*, supra, also contains a rather strong affirmation of the principle that Federal courts should follow the decisions of the State courts which "have interpreted State laws governing real property or controlling relations which are essentially of a domestic and State nature * * *." (Italic supplied.)

On the other hand, encouragement is to be found in the decision that State law does not control in determining the precise nature of a transaction involving questions of gain or loss for Federal income-tax purposes (*Burnett* v. *Harmel*, 287 U.S. 103) or in determining the taxable status of business groups under the Federal revenue laws (*Burk-Waggoner Oil Association* v. *Hopkins*, 269 U.S. 110).

Although it must be admitted that the familiar classification of property in common-law jurisdictions into "legal" and "equitable" interests is not strictly applicable to the respective interests of husband and wife in community property, nevertheless the principles which the United States Supreme Court has applied in recent cases involving revocable trusts and irrevocable "insurance trusts" justify the belief that the Court is not disposed to permit outstanding legal or equitable title in others prevent the imposition of the tax on that person who derives actual benefit from or exercises control over the income. In *Corliss* v. *Bowers* (281 U.S. 366, 378) in sustaining the power of Congress to tax the income of a revocable trust to the grantor, Justice Holmes declared:

"But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. * * * The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

Again in *Reinecke* v. *Smith* (289 U.S. 172) this rule of taxation was sustained. The "revocable trust" situation was thus distinguished by Justice Roberts from the situation in *Hoeper* v. *Tax Commission, supra:*

"The case is plainly distinguishable from *Hoeper* v. *Tax Commission* (284 U.S. 206), on which respondents rely, for there the attempt was to tax income arising from property always owned by one other than the taxpayer, who had never had title to or *control over either the property or the income from it.* The measure of control of corpus and income retained by the grantor was sufficient to justify the attribution of the income of the trust to him. This enactment does not violate the fifth amendment." (Italics supplied.)

The majority of the court (four justices dissenting) held in *Burnet* v. *Wells* (289 U.S. 670) that income tax may validly be levied against the grantor of an irrevocable trust on that part of the trust income which the trustee uses (pursuant to the directions of the trust instrument) for payment of insurance premiums on the life of the grantor. The trustee was directed to collect the insurance proceeds upon the death of the insured, purchase therewith securities

from the estate of the grantor, and hold such securities for the benefit of certain designated persons. For present purposes, the significant part of the decision is the following language of the majority opinion written by Justice Cardozo:

Through the devices thus neutralized (utilized?) as well as through many others there runs a common thread of purpose. The solidarity of the family is to make it possible for the taxpayer to surrender title to another and to keep dominion for himself, or if not technical dominion, at least the substance of enjoyment. At times escape has been blocked by the resources of the judicial process without the aid of legislation. * * * In these and other cases there has been a progressive endeavor by the Congress and the courts to bring about a correspondence between the legal concept of ownership and the economic realities of enjoyment or fruition. Of a piece with that endeavor is the statute now assailed.

The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically, in slavery to forms of phrases. "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid." (*Corliss* v. *Bowers, supra*, p. 378. Cf. *Burnet* v. *Guggenheim, supra*, p. 283.) Refinements of title have at times supplied the rule when the question has been one of construction and nothing more, a question as to the meaning of a taxing act to be read in favor of the taxpayer. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common-law traditions.

The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits. (*Milliken* v. *United States*, 283 U.S. 15, 24, 25 (Ct.D. 320, C.B. X–1, 472); *Reinecke* v. *Smith, supra.*) Liability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most-favored owner at a given time or place. (*Corliss* v. *Bowers, supra; Reinecke* v. *Smith, supra.*) Government in casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only ownership but any right or privilege that is a constituent of ownership. (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace*, 288 U.S., 249, 268; *Bromley* v. *McCaughn*, 280 U.S. 124, 136.) Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis. A margin must be allowed for the play of legislative judgment.

To overcome this statute the taxpayer must show that in attributing to him the ownership of the income of the trusts, or something fairly to be dealt with as equivalent to ownership, the lawmakers have done a wholly arbitrary thing, have found equivalence where there was none nor anything approaching it, and laid a burden unrelated to privilege or benefit. * * *

The language quoted affords basis for the hope that the court may apply this rule of "economic realities" to the community-property situation and hold that the spouse exercising control and management over the community property enjoys "privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis."

Ia may be that Congress could, on the authority of *Burk-Waggoner Oil Association* v. *Hopkins, supra*, recognize the "marital community" as a taxable entity. This theory would find some support in *Warburton* v. *White* and *Arnett* v. *Reade, supra*, as well as in some court decisions from community-property States. (See decisions of Supreme Court of Washington in *Ostheller* v. *Spokane R. Co.*, 182 P. 630, and *Clark* v. *Beggs*, 244 P. 121.) However, the trend of reasoning in the United States Supreme Court as evidenced in the foregoing quotation would seem rather to justify the more direct method set forth in your first proposal. The difference, both in origin and nature, of the rights involved in the "trust" method of ownership as distinguished from the rights involved in the community-property method, justify some doubt, of course, as to whether the court, when presented with the question directly will apply the same rules to each. But the present inequality of taxation among the States in this respect is so great that every effort should be made to bring about some equitable adjustment.

An expeditious testing of the constitutionality of a statutory provision based on your first proposal could be arranged so as to avoid any considerable tying up of taxes.

The file submitted by you is returned herewith.

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

STATEMENT OF COLIN F. STAM, COUNSEL, JOINT COMMITTEE ON INTERNAL-REVENUE TAXATION

Mr. Stam. We made quite a study of the Federal decisions involving the right of Congress to tax the husband upon the entire community income, and we did not find any decision of the Supreme Court directly in point. In fact, this question never has been directly passed upon by the Supreme Court. The case of *Poe* v. *Seaborn*, which has been cited by many as indicating that the Supreme Court passed on this question, seemed to go off on the intention of Congress rather than the power of Congress to tax that income. In that case the Court was construing a certain revenue act involving a taxpayer residing in one of the States.

Mr. Frear. Of what State?

Mr. Stam. Of Washington. The Court was construing a certain revenue act, and it went back and traced the legislative history leading up to that act and showed that Congress had specifically stricken from a revenue bill containing similar language a provision which would have taxed community income to the husband, and it finally decided that Congress did not intend under that act to tax community income to the husband.

There are certain decisions of the Supreme Court which would give encouragement to the view that if we did put a specific provision in the statute taxing community income to the spouse having management and control it might be upheld. One case is the Robins case, which involved the community property situation in the State of California. When that case was decided California had its old law in effect, and there was some doubt as to whether or not the wife had a vested interest in the community income. The Supreme Court held in that case that the wife did not have a vested interest in the community income; that she had a mere expectancy; and that, therefore, it was proper to tax all that income to the husband. In that case the Court said:

> Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.

That seemed to indicate in the mind of the Court that if they were wrong in holding that the wife had a mere expectancy they could still tax the husband on the whole income.

Mr. Frear. Was the California law changed after that?

Mr. Stam. The California law was changed to give the wife a vested interest.

Mr. Hill. Please give the date of that decision.

Mr. Stam. Of the Robbins case?

Mr. Hill. Yes.

Mr. Stam. January 4, 1926; and the citation is 269 United States 315.

Then we have another case which seems also to indicate that the Supreme Court might uphold the provision taxing the community income to the husband. That is the case of *Burnet* v. *Harmel*, decided November 7, 1932.

Mr. HILL. What was the last case?

Mr. STAM. *Burnet* v. *Harmel*. I have the Supreme Court citation, 53 Supreme Court Reports 74.

Mr. HILL. You have not the United States reports?

Mr. STAM. I have not the United States report here.

Mr. HILL. Could you supply that for the record?

Mr. STAM. I can; yes; it is 287 United States 103.

In that case the question was as to whether or not the income from the lease of an oil land was taxable as ordinary income or as a capital gain. Under the law of Texas a lease of oil land amounts to a sale of the oil in place, and it was contended that under that law Congress had to treat such income as a sale of a capital asset and subject it only to the capital-gains tax. Now, the Supreme Court refused to hold to that theory and disregarded the State law in that respect, stating:

> State law may control only when the operation of the Federal taxing act by express language or necessary implication makes its own operation dependent upon State law.

They cited as one of the cases as authority for that statement the case of *Poe* v. *Seaborn*, the community-property tax case in the State of Washington, and they held that the State law controlled because the Federal law was silent as to the taxation of community income.

In the Hoeper case in Wisconsin——

Mr. HILL (interposing). Please give the citation as you go along.

Mr. STAM. I will give that; it is 284 United States 206. The Hoeper case involved a statute of Wisconsin which required the husband and wife to file a joint return. The Court pointed out in that case that the wife's income and property were entirely separate under the State law from that of the husband; that the husband had no control over the property at all, and therefore it would violate the fourteenth amendment to require the husband to include the wife's income in his return.

We do not think that case is really in point, because there the husband had no control or management over the wife's income. It was her separate property and separate income.

In the case of *Reineke* v. *Smith* (289 U.S. 172) the Supreme Court was considering the taxability of a revocable trust, and they distinguished that case from the Hoeper case in this language:

> The case is plainly distinguishable from *Hoeper* v. *Tax Commission* on which respondents rely, for there the attempt was to tax income arising from property always owned by one other than the taxpayer, who had never had title to or control over either the property or the income from it.

In the Hoeper case the husband never had title to or control over the property or income, and they said that case was plainly distinguishable from these other cases.

There is one other case that I might mention which is not directly in point.

Mr. FREAR. The Wisconsin law required the joint return to be filed in all cases?

Mr. STAM. It required a joint return of husband and wife and it required the husband to pay the tax.

Mr. FREAR. Irrespective of the particular ownership?

Mr. STAM. Irrespective of the particular ownership.

The Wells case (289 U.S. 67) involved an irrevocable trust. In that case the husband assigned certain insurance policies, put them in trust, and the income from that trust was used to pay the premium on the insurance policies, and the Supreme Court held that we had a right under the Federal statute to tax that income to the husband, for the reason that it was for his benefit; that is, the payment of these premiums on this policy on his own life was for his own benefit. While that case is not exactly in point, yet the court makes some statements in that case which are helpful in indicating what they might do.

Mr. HILL. You do not contend that a husband in a community-property State has such control as is involved in the Reineke case, the last case to which you referred?

Mr. STAM. In the Wells case the husband had no control over the trust; it was irrevocable. He was getting a benefit out of the income which was applied to the payment of the premium on the insurance property.

Mr. HILL. He created the trust and he directed how the income should go?

Mr. STAM. Yes; but he could not direct to whom the income could go after the trust was created—that was fixed by the trust.

Mr. HILL. He directed how the income should be applied?

Mr. STAM. Yes; but he had no control over it.

Mr. HILL. In the case of community-property income, the husband has no such control; he cannot dispose of the income as he sees fit. He has no right under the community-property law to dispose of the income and disregard the wife's right, so the analogy does not hold up as between the two cases.

Mr. STAM. In some respects, but there is some analogy there, because in a lot of these community-property States, the husband has control and the wife cannot call him into account except where he disposes of the property; he has all the economic benefits.

Mr. HILL. He cannot dissipate it; he cannot use it for his own devices. So long as he uses it for the benefit of the community, it is all right.

Mr. STAM. He can use it.

Mr. HILL. It is open for the wife to come in and say that it is not being properly used.

Mr. STAM. She has a hard time to call him to account.

Mr. HILL. She has the right.

Mr. STAM. I want to read a short statement from that case:

> But taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed, the actual benefit for which the tax is paid. Refinements of title have at times supplied the rule when the question has been one of construction and nothing more. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common-law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice.

They said we could ignore the common-law concept of legal titles if to do so would promote justice. That is, if the economic enjoyment was in the husband, the mere fact that the legal title was in someone else would not be sufficient to overturn the statute.

I think that is about the crop of cases that I have, except I notice that somebody made a reference to the partnership situation in the noncommunity States. I would like to call your attention to the case of *Burnet* v. *Leinenger* (285 U.S. 136), in which the husband tried to assign to the wife a part of his interest in a partnership, and the court pointed out that the wife had contributed no capital or rendered no services to the partnership, and they held the assignment invalid, and that the profits of the partnership were all taxable to the husband.

That case seems to me to indicate that it would be very difficult in a noncommunity State for the husband to divide his partnership interest with the wife, unless she actually contributed something tangible, like capital or services.

Mr. HILL. In that case the wife contributed nothing and she was not a member of the partnership?

Mr. STAM. Yes.

Mr. HILL. The husband sought to assign to her a part of his income?

Mr. STAM. He claimed it was part of his interest in the partnership.

Mr. HILL. Was it income or his interest?

Mr. STAM. The Supreme Court held it was nothing but an assignment of his profits, although he contended that he was assigning a part of his interest.

Mr. SHALLENBERGER. You are clarifying something I have been trying to understand. Take a State like Washington. I understand if this bill would become law that the marital property would make one return. In the State of Nebraska I am making one return and my wife makes a return. If the law passes, in that State will we still be permitted to make separate returns?

Mr. STAM. Yes; because you have no control over your wife's income.

Mr. SHALLENBERGER. Otherwise, I may be required to do it? In the community-property States, would you be required to do it?

Mr. STAM. In the community-property States you would be, because the husband has the management and control over the community property.

Mr. FREAR. If the wife had independent interests, that would put them in the same class?

Mr. STAM. That would put her in the same class as the husband and wife in a noncommunity State.

Mr. FREAR. I was going to ask this question. Of course the main committee may be a supreme court here. The subcommittee does not assume that province. I was going to ask what would be the difficulty in presenting this case to the Supreme Court for clarification on this question?

Mr. STAM. The Supreme Court would never pass on this question unless they had an actual case before them. Of course, they would never have an actual case before them unless we put something in the statute, because they have already held that the present statute does not tax community income. We would have to put something in the law.

Mr. FREAR. That is the purpose of the argument which you have just been making?

Mr. STAM. Yes.

Mr. HILL. You referred to the case of *Poe* v. *Seaborn*, involving property rights and the rights of taxpayers in the State of Washington to make separate returns. In that case it was held that such agency of the husband was neither a contract nor a property right vested in him, and that it was competent to the legislature to confer the agency on the wife alone or to confer a joint agency as it saw fit. In other words, the mere fact that the husband has the control of the community estate does not give him any vested right in the community estate other than that fixed by law—his one-half interest—and that it gives him no property right as the manager or the controller. The legislature may change that at any time.

Mr. STAM. The trouble about that case was that the court held, in the first place, that the test of taxability was ownership, and to determine who owned the property we had to go back to the State law. Now, they pointed out clearly that the husband did not own it; that ownership involves legal title. They pointed out clearly that the husband did not own the wife's portion of the community income, because under the State law the wife had a vested interest; but if the statute had made the test not ownership but management and control, then the court would have had a different question.

Mr. HILL. What are you going to do with the sixteenth amendment?

Mr. STAM. The sixteenth amendment says we can tax income; it does not say to whom we can tax it.

Mr. HILL. It might tax your income to me or my income to you?

Mr. STAM. If they tax your income to me, it would depend on what command I had over your income. If I had a practical command, which the court could say was equivalent to ownership, they might.

Mr. HILL. Suppose you should be appointed my guardian; the income tax would be paid out of my property?

Mr. STAM. That is true. You have the legal title. The guardian does not get the same beneficial enjoyment out of the ward's property that the husband gets out of his own salary and the use of his wife's income.

Mr. HILL. What beneficial enjoyment in the community property does the husband get out of the wife's income in the community-property States that he does not get in the non-community-property States?

Mr. STAM. The husband in a non-community-property State in many cases never sees his wife's income.

Mr. HILL. But the idea of the marriage relation being a mutual beneficial relationship, not only as to sociability and companionship but also as to property involved, would probably be as potent an argument as to the relationships in the noncommunity States as in the community States.

Mr. STAM. That is the question.

Mr. HILL. We have those dominating feminine characters in the community States as well as in the noncommunity States.

Mr. STAM. That is true.

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Mr. FREAR. I was going to suggest this: That, if possible, Mr. Stam remain here, because many of these cases are quite involved, and those of us who are not accustomed to following the close distinctions might receive aid from him.

Mr. SHALLENBERGER. I was going to make this announcement: That Mr. Hill has to be on the floor of the House when it convenes, because the tax bill comes up at that time, and we are going to adjourn a little before 12. We will not reach the Members of Congress this morning anyway.

Mr. HILL. I was going to suggest that we have a number of witnesses who are Members of Congress, and a number of them, no doubt, have made as thorough a legal study of the question as their time has permitted; we have here Judge Sumners of Texas, and some of the Representatives from the community-property States, who have made a very deep and thorough study of the subject. For the benefit of the record I would like, if compatible with your plan, to have the testimony of those men in the early part of the record, and the Members of Congress generally can come on at a later time. I will say frankly that we want to get a record here that Members of Congress will read. You know, if you get a whole volume of matter in the record before the real gist of the subject is presented, they might overlook the best arguments in the whole record. My thought is we might hear the representative of the Treasury Department, Mr. Bartholow, and then hear the attorneys representing the community-property States.

Mr. SHALLENBERGER. I was going to start off with Mr. Sumners, of the Congressmen, and I think he will not be reached before we have to adjourn. We will hear Mr. Bartholow next.

STATEMENT OF BENJAMIN H. BARTHOLOW, SPECIAL ASSISTANT TO THE SECRETARY OF THE TREASURY

Mr. SHALLENBERGER. I have been asked about the number of witnesses here. I will say that in addition to Mr. Bartholow we have Mr. Monarch and Miss Helen Carloss, of the Department of Justice, and then we will take up the Members of Congress.

Mr. BARTHOLOW. I suppose that the most important thing is to bring down to date the position of the Treasury Department on the question of the taxation of community income. You will remember that in December the Acting Secretary of the Treasury, now the Secretary, presented a statement on this subject in which he pointed out that, in the opinion of the Department, a discrimination was now in force, due to the method of taxing community income. In that connection he recommended to the committee, quoting from his statement, "That the committee consider whether a husband and wife living together should not be required to file a single joint return, each to pay the tax attributable to his share of the income."

Mr. FREAR. That was the present Secretary?

Mr. BARTHOLOW. Yes. The Secretary's recommendation in December was made largely because of the existence of this community-property question, and was also made in the hope of possibly effectuating certain remedies in other States to make it impossible for these husband-and-wife transactions seriously to reduce the revenues.

Mr. HILL. That was a recognition of the fact that they are doing that in other States; that husband and wife transactions are taking place that actually reduce the revenues.

Mr. BARTHOLOW. Congress has recognized that situation by a provision in the pending bill which would disallow any loss resulting from the sale of property between husband and wife. That, of course, was the principal trouble aimed at in the non-community-property States. It was thought that a single provision could effectuate a remedy in all of these transactions.

However, since that recommendation was made, considerable study was given to that provision, and the conclusion was reached that it presented numerous complications which would involve a long and complicated provision in order to accomplish its object. For that reason the Treasury Department now feels that it would be adequate, at the present time, to adopt some such amendment as is proposed in the Treadway bill, in lieu of that contained in the Secretary's recommendation in December.

Mr. Parker and Mr. Stam have outlined, first, the reasons why it is felt that some remedy should be enacted into law, and, secondly the legal aspects and difficulties which must be overcome if that provision is to be sustained. I shall not go into all of those questions in detail. The Treasury Department concurs generally in the views which have been expressed, both as to the fact that discriminations do result from the present law in favor of the community-property States, and on the point that the provision which has been proposed to remedy that situation would probably be sustained as a matter of law.

Mr. HILL. Do I understand you are giving your own opinion?

Mr. BARTHOLOW. I am giving the opinion of the Treasury Department.

Of course, the principal objective is to make effective the graduated rate schedules of our law. Since the first income-tax law of 1913, we have followed the principle of a graduated rate on large incomes. That principle was attacked at the very threshold and was held to be constitutional by the Supreme Court. As time went on, it was felt that the right of husband and wife in these community-property States to divide the income which, in the usual case, is earned by the husband as the breadwinner, ran counter to the principle of imposing graduated rates on large incomes. As a result, in 1921 the House passed a provision which would have accomplished much the same result as would result from the enactment of the pending bill.

Mr. FREAR. May I ask right there, have you anything to show the vote that was had, or who offered it, or the details of that bill that passed?

Mr. BARTHOLOW. No; I have no information as to those details. The history shows that the provision was incorporated in the 1921 bill as passed by the House.

Mr. FREAR. In 1921?

Mr. BARTHOLOW. In 1921, and that provision was deleted by the Senate and the House receded in the conference. Again, in 1924, a similar provision was incorporated in the revenue bill of that year but was thrown out before the bill was passed by the House.

Mr. Frear. In conference?

Mr. Bartholow. No; before it went to the Senate. And so, we see that this problem is one which both Congress and others have been considering for a long time.

Mr. Frear. How was it thrown out on the floor?

Mr. Bartholow. It was not approved by the House.

Mr. Frear. By the House or by the Committee on Ways and Means?

Mr. Bartholow. I have not the evidence as to that; it was in the bill as introduced in the House.

Mr. Frear. Was it in the bill as reported by the committee?

Mr. Bartholow. My understanding is it was in the bill as reported by the Ways and Means Committee.

Mr. Sumners. It was rejected by the Ways and Means Committee.

Mr. Bartholow. I was guided by a statement which appears in the memorandum of the joint committee which says that when the 1924 act was introduced, it contained a community-property provision which was stricken out by the Ways and Means Committee. That is right, it was stricken out by the Ways and Means Committee.

Mr. Parker has gone into the details which indicate to him that discrimination results from the present system and, therefore, I need not go further into those matters.

On the legal side, the Treasury recognizes the difficulty as a matter of law of this proposal and has considered a number of different remedies which might be supported. As has been stated, the Treasury now believes that as between its original proposal and the one now specifically before the committee, the latter is preferable.

Mr. Frear. Mr. Treadway's bill?

Mr. Bartholow. Yes; Mr. Treadway's bill.

Mr. Hill. You are speaking of the legal aspect?

Mr. Bartholow. Yes; I am speaking of the legal aspect.

Mr. Hill. What is the question respecting the unconstitutionality of the Treasury Department's proposal to the committee?

Mr. Bartholow. It was the administrative difficulties, running all through the bill.

Mr. Hill. I am speaking only of the unconstitutionality or legality of it.

Mr. Bartholow. The Treasury is disposed to prefer this new proposal to its proposal of December more on the ground of avoidance of very many administrative difficulties and of the numerous amendments which would have to be made to provisions appearing all through the revenue act. A provision of the kind under consideration is relatively simple and has the merit of limiting the question to one issue. It is believed that the pending proposal is as likely to receive judicial sanction as any other proposal that has come to the attention of the Department. This is said with a full realization of the fact that the Supreme Court in the *Hoeper case* has laid down the proposition that any attempt to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the fourteenth amendment.

Mr. Frear. That is the *Wisconsin case?*

Mr. Bartholow. Yes; that is the *Wisconsin case.* I should like to call to your attention that the Supreme Court, in its prevailing opinion, was careful to point out in at least three instances that under the facts of that case the husband had no control over the income in question and had no title thereto. In every instance the Court referred to both points. In later decisions, for instance *Reinecke* v. *Smith* (289 U.S. 172), the Supreme Court has clearly held that legal ownership of income is not necessary in order to make it constitutional to tax such income to a taxpayer. That is the case of a revocable trust, where the important thing is the control of the income by the taxpayer, even though there is a complete absence of legal title to the income in the taxpayer.

Mr. Hill. You say legal title; how about beneficial interest or equitable title?

Mr. Bartholow. Equitable title is not necessary to support an income tax, as witness the cases which have sustained taxing a trustee who has a mere legal title in the income of the trust.

Mr. Hill. As trustee of the estate or the trust, not out of his own property?

Mr. Bartholow. The tax liability runs against the trust as an entity.

Mr. Hill. Is there not a clear distinction there between that kind of a case and the case here where you seek to tax the husband on the income of a wife?

Mr. Bartholow. As has been pointed out, there are legal distinctions which can be made as to all the decisions which are cited in favor of the present bill. All that can be said is that these various decisions contain statements about control being sufficient, and, as in the *Corliss case,* about the refinements of title not being the important thing but rather the command over the property taxed. Taking these decisions as a whole, the Department feels that the chances are that the Supreme Court would sustain the provision now under consideration.

Mr. Hill. These cases you have been citing are trust cases. In other words, the taxpayer is taxed in a representative capacity and pays the tax out of the fund which he represents, and not out of his individual fund?

Mr. Bartholow. That is true, but, as has been pointed out in *United States* v. *Robbins,* the Supreme Court rendered a decision under the California law at a time when the wife had no vested interest——

Mr. Hill (interposing). Neither in the so-called "community property" nor in the income of the community property?

Mr. Bartholow. That is right. Assuming, however, that she might have an interest under the existing law, because that was a question upon which some of the courts differed, it was said that, even if the wife had a vested interest, it did not follow that Congress could not tax the husband for the whole income.

Mr. Hill. How about the *Hoeper case* in that connection?

Mr. Bartholow. In the *Hoeper case* we know that the court pointed out consistently that the husband had neither title nor control or management of the income in question.

Mr. Hill. Your argument comes to this question: You are hinging your contention on the fact that there is management and control.

Mr. Bartholow. Yes. The question is whether the management and control as they exist in the various community-property States are sufficient to justify the taxability of the income to the one who has that management and control. That is a proposition on which there are no direct precedents.

Mr. Hill. The husband in community-property States manages the community property and the community income. Insofar as the wife's interest is involved, he is her agent; he is in a representative capacity insofar as he manages her part of the community estate. This legislation proposes to tax him out of his individual property for the income of the person for whom he is acting in a representative capacity. Is not that true?

Mr. Bartholow. I think the answer to that question will depend much upon the various State laws, which vary as to the rights of the husband in the community income. In the Robbins case, which was under the California law, the court assumed for the purpose of argument that the wife had a vested interest; nevertheless, in making the statement which I referred to a moment ago, the court said:

> Although restricted in the matter of gifts, the husband alone has the disposition of the fund. He may spend it substantially as he chooses.

Mr. Hill. That is under the previous California law, not under the present law?

Mr. Bartholow. The accountability of the husband to the wife varies under the different State laws.

Mr. Hill. That does not apply to California at this time?

Mr. Bartholow. I think so.

Mr. Hill. It does not apply to the community property in States generally where, under the State law, the property is vested in the wife equally with that of the husband.

Mr. Bartholow. The law may be that the wife has a vested interest. Nevertheless, the husband in many cases has a wide range in the disposition he makes of that vested interest, so long as he does not give it away or make an outright disposition of it which is in fraud of the rights of the wife.

Mr. Hill. Some of us have to be on the floor promptly at 12, and I move that we recess until 10 o'clock tomorrow.

Mr. Shallenberger. We will adjourn until 10 o'clock tomorrow morning.

(Thereupon, at 11:45 a.m., the committee adjourned until 10 a.m. tomorrow, May 2, 1934.)

COMMUNITY PROPERTY INCOME

WEDNESDAY, MAY 2, 1934

House of Representatives,
Subcommittee of the Committee on Ways and Means,
Washington, D.C.

The subcommittee met at 10 a.m., Hon. A. C. Shallenberger (chairman) presiding.

Mr. Shallenberger. The committee will please come to order. We will hear first from Senator Ashurst.

STATEMENT OF HON. HENRY F. ASHURST, A UNITED STATES SENATOR FROM THE STATE OF ARIZONA

Senator Ashurst. Mr. Chairman and gentlemen of the committee: My first duty is to thank you for the unusual and distinguished privilege you have extended me and in return for this courtesy I promise that I shall be brief.

I speak, if you please, Mr. Chairman and gentlemen of the committee, in opposition to H.R. 8396, which is a bill, according to its title, regulating the taxation of community property income.

The bill proposes to deprive and to take from the spouses in the community-property States, their right to make separate and individual income-tax returns to the Federal Government. The bill, in my judgment, is clearly and wholly unconstitutional and if passed will be void, nugatory, and of no effect.

Still, it would not be proper on the part of representatives of the community property States to rest wholly upon that assurance. It is their duty to inform this committee that the passage of such a bill would be a brutum fulmen, a mere harmless thunderbolt. Inasmuch as the courts are already congested with litigation, the timely defeat of this bill would prevent extended and protracted litigation and would save much annoyance to the taxpayers and to the Government.

I have no criticism to make of the proponents of this bill. They are like sportsmen. They go out to bag as many ducks as they may. The Treasury wants to gather in as many dollars as they may for the reason and upon the ground, forsooth, that they need the money.

Gentlemen, busy as you are, you have not the time to listen to an extended history of the origin and growth of the community-property system more than to permit me to say that the community-property system is so much at variance with the principles of the common law that the community-property system is devoid of all analogies to and with the common-law system of jurisprudence.

Therefore it is apparent, that we need not look to the English law to find the source whence the community-property system sprang. The community-property system is believed to have had its origin in Spain or possibly in the communal system of tribes in the Teutonic forests. Suffice it to say that it was the law of Spain and of France, and it is simply, solely, and only the right of the wife to own one half of all the property acquired during the coverture, except in some community-property States, property acquired by the other spouse by gift, devise, or descent, may be separate property.

In our community-property States during coverture one half of all of the property acquired by the husband, ipso facto and instantly becomes property of the wife.

As to the salary of a United States Senator or Representative in Congress from a community-property State, the moment it is due to him, one half thereof belongs to his wife.

The Seven Years War in Europe was concluded in 1763. The 7 years' war, or the so-called "French and Indian War" in the United States likewise concluded in 1763. The two wars were of like duration, 7 years. Under the treaties of 1763 French power disappeared from North America.

New Orleans east of the Mississippi River and Louisiana on the west side were ceded to Spain. Spain held New Orleans and Louisiana until 1800. During those years of Spanish sovereignty the ganancial (meaning gainful) or community-property system took its root and growth in New Orleans and in Louisiana.

Spain retroceded New Orleans and Louisiana to France in 1800. On Easter Sunday, on the 10th day of April 1803 Napoleon returned to St. Cloud from Easter services, called two of his most important ministers and said, "I must sell Louisiana at once. Do not even wait for the arrival from America of Mr. Monroe."

Suffice it to say, without going into history, within 20 days the sale of Louisiana was made to the United States by Napoleon the Great to our greater Jefferson.

It was understood that all of the systems, rights, and laws that had been imposed upon and had become a part of the polity and laws of the people of New Orleans and Louisiana, under Spanish rule, should abide with the people under the new government.

Indeed, when our Minister asked Talleyrand, "What do we obtain under this treaty?" Talleyrand replied with his usual facile way of avoiding questions, "You have a great bargain; you have a great bargain." He repeated, "You get all that France got from Spain under her treaty of San Ildefonso and all of the rights"—Talleyrand for once committed himself—"all of the rights and customs of the people there that were set up by Spain or France shall pass on to the Americans."

"All", of course, included the community-property system. Louisiana became a State. She kept the community-property system. Texas achieved her independence, and she set up the community-property system.

Other new States saw the benefits, if you please, of the community-property system as against the harsh doctrines of the common law, which provided for dower for the wife and tenancy by curtesy for the husband, but for no community-property system.

Although a devotee of the English law and profoundly devoted to the common-law system, I here pay my respects to the chivalry and to the gentlemanly idea behind the community-property system; that is to say, whereby the wife, who, side by side with her husband, smites the face of nature and acquires property, is considered to be, and is, owner of half of all that is acquired during the coverture.

So New Mexico, Arizona, Nevada, California, Washington, and Idaho, following Louisiana and Texas, saw fit to adopt and did adopt and carried proudly with them when they became States, the community-property system.

Gentlemen, in conclusion I ask your attention, respectfully, of course, to volume 282 of the United States Reports where are grouped a number of decisions by the Supreme Court of the United States on this question. You will perceive that the year is 1930.

Mr. Hill. What is the title of that case?

Senator Ashurst. The case that came up from Washington is Poe against Seaborn.

The case coming up from Arizona was Goodell against Koch.

The case coming up from Texas was Hopkins against Bacon.

The case coming up from Louisiana was Bender against Pfaff.

The case from California was United States against Malcolm.

But it is argued that the husband has the management and control of the estate and that therefore he should make the return and pay the income tax. Do I need to say that management and control mean the right to sell, to mortgage, to pledge, to hypothecate the property? The husband may not in the community-property States, transfer or mortgage the property without the wife joining in the mortgage or conveyance.

In conclusion, we are all busily engaged, the courts are congested; why pass an act that is clearly, without any doubt, unconstitutional?

Thank you, gentlemen.

Mr. Shallenberger. We thank you for your very informative remarks, Senator.

The Chairman. We will now continue with Mr. Bartholow's statement from where we left off yesterday.

STATEMENT OF HON. BENJAMIN H. BARTHOLOW, SPECIAL ASSISTANT TO THE SECRETARY OF THE TREASURY—Resumed

Mr. Bartholow. Mr. Chairman, I have finished my statement, unless members of the subcommittee wish to ask some further questions.

Mr. Shallenberger. Mr. Hill desires to ask you some questions.

Mr. Hill. Mr. Bartholow, I understood from your statement yesterday that you are appearing here in an official capacity representing the Treasury Department; that the views that you express upon this proposed legislation are the views of the Treasury Department and not necessarily your own views?

Mr. Bartholow. That is correct.

Mr. Hill. You will recall that the Treasury Department, through the Secretary of the Treasury, submitted a statement to this committee when we had under consideration the revenue bill, and among

the recommendations, or among the observations or remarks contained in that statement, was a brief discussion by the Secretary, of the community property tax matter.

Quoting in part from that statement, I select the following:

The Treasury Department therefore recommends that the committee consider whether a husband and wife living together should not be required to file a single joint return, each to pay the tax attributable to his share of the income. Such a provision has long been in force in other countries.

That followed a statement in which reference was made to 8 of the 48 States as having a community property law.

The part of the statement that I have just quoted does not refer alone to incomes in community property States, but would embrace the incomes of husbands and wives in all of the 48 States; is not that true?

Mr. BARTHOLOW. That is true.

Mr. HILL. In other words, a suggestion was made there by the Secretary of the Treasury that the matter of throwing the incomes of both husband and wife together for the purpose of computing the income tax might well be considered by the committee, and that if such recommendation should be embodied in legislation it would apply to all of the 48 States.

Mr. BARTHOLOW. That is correct.

Mr. HILL. And would have no specific reference to community property income or to community income. Now, from the standpoint of equality in dealing with the incomes of husbands and wives, that statement is much more fair than the one embraced in the bill now before this committee; is not that so?

Mr. BARTHOLOW. No; I do not believe it is as fair, Mr. Hill. After that recommendation was made, further consideration was given to the question by Treasury officials, and it was found that to put that principle in the law would involve modifying numerous provisions throughout the revenue act.

Mr. HILL. I am not talking about the administrative difficulties. I am talking about the fairness of it, based upon equality of treatment of husbands and wives in all of the States.

Mr. BARTHOLOW. To tax the income from the wife's separate property or from the husband's separate property in part to the other spouse, such income being entirely within the control of the spouse who owned the property and not being used for family purposes, would seem to be unfair, much more unfair than taxing to an individual income which was under his management and control, in such degree that the Supreme Court said in the case of *Hopkins* v. *Bacon* (282 U.S. 122):

They * * *—

Referring to the Texas laws—

provide, as is usual in States having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own.

That is a résumé of the general situation existing in the community property States upon which the provisions of the pending bill are predicated.

That situation is not comparable to the one which would be involved in the former Treasury recommendation, under which the income from the wife's separate property, over which she has complete control and over which the husband has no control and in which he does not share, should in effect be taxed to the husband or should be used in measuring the husband's income-tax liability.

Mr. HILL. From the standpoint of equality of treatment in the matter of the incomes of husbands and wives or the tax on incomes of husbands and wives, is not the statement in the Treasury recommendation to be preferred—this is purely from the standpoint of equality of treatment—over that which is embraced in the bill before this committee?

Mr. BARTHOLOW. I do not believe so.

Mr. HILL. It certainly would treat all incomes of husbands and wives on the same basis, would it not? I am not talking about the legality of it. I am talking about the equality and the fairness of it; I am talking of it based upon equality of treatment.

Mr. BARTHOLOW. It would certainly treat all of the 48 States equally, but the inequities involved in that treatment seem to me to be considerably greater than the inequities which might be involved in the proposal now under consideration.

Mr. HILL. The inequity to which you refer is the inequity of taxing the income of one person to another, is it not?

Mr. BARTHOLOW. Yes. The income that one person has no share in, does not manage and control, and cannot use in any way, should not be used to measure such person's income tax.

Mr. HILL. The inequity of taxing the income of one person to another; that is the inequity you are talking about?

Mr. BARTHOLOW. Yes. By the income of a person, however, I mean the income which is owned by that person or the income which that person can effectually use and dispose of as he sees fit.

Mr. HILL. You are thoroughly familiar with the case of Poe against Seaborn and the other cases that rest upon it, decided by the Supreme Court in 1930. I know that you have made a very close analysis of those cases. Was it not held in those cases that the community income was vested equally in the husband and wife and as their vested property?

Mr. BARTHOLOW. It was held that both had a similar vested interest in the income.

Mr. HILL. And it was a vested interest in the wife as well as in the husband?

Mr. BARTHOLOW. That is right, even though the husband had these very substantial powers over that income, and, as the Court said, could deal with that income very much as if it was the income of himself.

Mr. HILL. It is not your understanding, is it, that in those cases the Court held that the fact that the husband had the management and control of the community income, community estate, gave him any right in the wife's part of that income?

Mr. BARTHOLOW. Those cases pointed out very clearly that he had very substantial rights in that income. They also indicated the limitations, namely, that he could not give it away or pay his own debts with it, but that, as far as the disposition of the community income was concerned, he had the complete right to dispose of it as if it were his own separate income.

Mr. HILL. For the benefit of the community, not for his own benefit?

Mr. BARTHOLOW. No. That limitation is not mentioned in the decisions.

Mr. HILL. That limitation is in the laws, though. He cannot go out and use that property as he pleases. Of course, the wife might be acquiescent and permit him to do it. She has the right under the law to prevent him from using her part of the income or her part of the community property in discharging his obligations or using it in any way that he might see fit that would not be in the interest of the wife. That is basic in those community-property States. The mere fact that he has the agency, the management and control of the community estate, his part of it as well as the wife's part, gives him no vested right in the wife's part of the community estate. Is that not your understanding of the holding in those cases?

Mr. BARTHOLOW. He has the power to dispose of it. The Court pointed out that while she may have a legal right to it, he has the power over it; that there is a distinction between right, power, and accountability; that, however, the husband's accountability for the use of community income was very limited.

Mr. HILL. And do you contend that in view of the holdings in the Poe against Seaborn case and other cases following, the husband has any vested right in the wife's half interest in that community property?

Mr. BARTHOLOW. The opinion in the Seaborn case points out that the wife has a vested right in half of the community property, and therefore I cannot very well say that the husband has a similar vested right. While a wife may have a vested right in her half, the husband has the full power over that half with very little accountability in law. The Court pointed out that it was contrary to public policy to prescribe an accountability which would bring litigation within the family and that, as a matter of public policy, it was necessary to vest the husband with that full power so that a stranger, dealing with him, may be protected in his dealings.

Mr. HILL. Here is what the Supreme Court said, in part, in the case of Poe against Seaborn. In that case, referring to the case of *Warburton* v. *White* (176 U.S. 494), the Court said:

> In that case, it was held that such agency of the husband was neither a contract nor a property right vested in him, and that it was competent to the legislature which created the relation to alter it, to confer the agency on the wife alone, or to confer a joint agency on both spouses, if it saw fit—all without infringing any property right of the husband.

That is what the court said about the matter of management and control, the power that you speak of in the husband. It is not a vested right, it is simply a power placed there at the will of the legislature to give him the management; that is, to vest it in someone, and he is selected as that someone to manage and control the community estate. Yet it gives him no property right. It certainly gives him no right in the wife's half of the community income or the community property; is not that true?

Mr. BARTHOLOW. It is true he has no vested right in her half.

Mr. HILL. Now, in Poe against Seaborn the point was made that the wife had this vested right and the husband had a vested right, each one half in the community income, and that therefore each was entitled to make his own separate return; is not that true?

Mr. BARTHOLOW. Yes; because the revenue statute involved imposed the tax liability upon the one who had the vested right in the income.

Mr. HILL. Had the ownership.

Mr. BARTHOLOW. And the court did not pass upon the right of Congress to change the rule of taxing income according to ownership.

Mr. HILL. But you keep evading my questions. I am trying to get you down to the point of what that case held. Was it not on the question of the ownership of the income?

Mr. BARTHOLOW. I have admitted that on several occasions, Mr. Hill.

Mr. HILL. And in that holding the court permitted each of the spouses to file a separate return because each had an ownership in one half of the income?

Mr. BARTHOLOW. That is correct.

Mr. HILL. If each had an ownership in one half, where does this matter of the management and control come in as vesting a right in the husband that affects the property right of the wife in her half of the income or her half of the community estate?

Mr. BARTHOLOW. Cannot that question be put a little more simply?

Mr. HILL. Maybe so.

Mr. BARTHOLOW. It is hardly susceptible of an answer.

Mr. HILL. The court held in the Seaborn case that the wife had ownership of one half of the community income and permitted her to file a separate return, on the basis of that holding. If she had ownership in one half of the community income, as held in the case mentioned, in what way does the right of management and control conferred by statute on the husband affect that vested right or that ownership of the wife in that one half of the community income?

Mr. BARTHOLOW. The theory is that Congress can, of course, tax income to the one who has ownership thereof, but that Congress is not restricted and can tax income which is owned by one person to another person, because of the fact that that other person has certain substantial rights over that income, such as the right to control the income.

Mr. HILL. You say "right." You made a distinction a while ago between right and power. It is power you are talking about now instead of right?

Mr. BARTHOLOW. Yes.

Mr. HILL. He has the power because the law has created him the agent. But he has simply the power of management and control. He has no title in the wife's one half of the community property. It is her separate property. I think that case is absolutely clear upon that point.

I appreciate the fact that it does not go to the constitutional question, but it did hold that the husband and wife had each one half ownership as vested title in the community income.

Mr. BARTHOLOW. There cannot be any question about that. The court clearly held just that.

Mr. HILL. That being true, we come to the Hoeper case in which there is no management and control by the husband, but the wife had her separate income and the husband had his separate income. The Wisconsin court sought to tax the husband for income on the basis not only of his own income but also the income of his wife. The court held that that was in violation of the fourteenth amendment to the Constitution.

If you leave out this agency feature in the community-property States, this agency power of the husband over the community income and community property, have you not exactly the same situation as to property rights and ownership in the community-property States as you have in the State of Wisconsin, which is a noncommunity-property State?

Mr. BARTHOLOW. The same ownership exists in both cases, except that in the Hoeper case the wife had both the ownership of the income and the management and control thereof, so that she was the only person who could be legally taxed on that income, but——

Mr. HILL. Just limit it to the question of ownership. Just limit your answer to the question of ownership. Then what do you say?

Mr. BARTHOLOW. She had the ownership in the Hoeper case, exactly as the wife had the ownership in the case of Poe against Seaborn.

Mr. HILL. Yes. Now, what is your idea of the character of the tax on income? Is it a personal obligation of the person receiving the income?

Mr. BARTHOLOW. It is.

Mr. HILL. It is a direct tax, is it not?

Mr. BARTHOLOW. In some respects an income tax is a direct tax. I think you are referring to the obligation for the tax. The obligation is undoubtedly a direct personal obligation.

Mr. HILL. And it is enforceable against the person who receives the income?

Mr. BARTHOLOW. There can be no doubt as to that. It is enforceable against the person receiving the income.

Mr. HILL. Is it enforceable against any other person?

Mr. BARTHOLOW. Congress might provide for its enforceability against more than one person.

Mr. HILL. You mean as a personal obligation?

Mr. BARTHOLOW. As a personal obligation.

Mr. HILL. Take the case of the trusteeships that have been mentioned here. Aside from the one case referred to—I forget the style of it—where the creator of the trust directed that income from the trust fund, or at least part of the income from the trust fund, should be used to pay the premium on an insurance policy, in that case it was held that he was applying this money to his own beneficial use, he had created the trust, and hence, as I understand the holding, it was held that he should be taxed for that part of the income. But there was a beneficial use in him.

Where the manager or the one in control of the funds out of which the income flows is acting solely in a representative capacity, then is that a personal obligation against the representative or agent?

Mr. BARTHOLOW. I think there is good ground for making it a personal obligation against that agent if he can use the money to live on and to buy what he sees fit, even though he may be subject to some restrictions as to how he disposes of it. Of course, that is the whole issue, whether those rights are sufficient to justify imposing the tax against him.

Mr. HILL. In Hoeper against Tax Commission of Wisconsin, the State court assigned two reasons which it thought removed the constitutional objection to the application of the statute in the instant case; that is, the Hoeper case, and it cited certain income-tax cases in that State where the statute involved in this case was in question and was sustained on the ground that the provisions under attack are necessary to prevent frauds and evasions of the tax by married persons, and stated that the decision of this court in *Schleshinger* v. *Wisconsin* (270 U.S. 230), was not inconsistent with the views expressed by the Supreme Court of Wisconsin in its earlier decision.

That was the contention of the proponents of the tax in Wisconsin. The supreme court said:

> To this we cannot agree. In the Schleshinger case this court held invalid a statute which, for the purposes of inheritance tax, classified all gifts inter vivos effective within 6 years of death as gifts made in contemplation of death. To the argument of the necessity for such classification to prevent frauds and evasions, it was answered * * *.

And so forth.

Now, that is what you are trying to do here, evidently, prevent what is claimed to be fraud or evasion; let us not say fraud but evasion of income taxes in these community property States. That is the contention being made generally by the proponents of this character of legislation before us now.

> To the argument of the necessity for such classification to prevent frauds and evasions, it was answered (p. 240):
>
> "That is to say, A may be required to submit to an exactness forbidden by the constitution if this seems necessary in order to enable the State readily to collect charges against B. Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purposes whatsoever."

Again, further on in that opinion in the Hoeper case the court said:

> Again, it is clear that the law is a revenue measure, and not one imposing regulatory taxes. It levies a tax on "every person residing within the State" and defines the word "person" as including "natural persons, fiduciaries, and corporations", and "corporations" as including "corporations, joint-stock companies, associations, or common-law trust." It lays graduated taxes on the incomes of natural persons and corporations at different rates. It is comprehensive in its provisions regarding gross income and allowable deductions and exemptions, and is in most respects the analog of the Federal income tax act in force since 1916. It is obvious that the act does not purport to regulate the status or relationship of any person, natural or artificial. Arbitrary and discriminatory provisions contained in it cannot be justified by calling them special regulations of the persons or relationships which are the object of the discrimination.

Now, is not that the case here? Is it not being sought in this legislation to regulate through Federal statute, the status of property rights as between husband and wife?

Mr. BARTHOLOW. Certainly there is no purpose to regulate the relations of husband and wife, although there is the admission that it is felt that the present discrimination or the present differences in those two systems result in an undue burden upon the taxpayers in 40 States as against those in the other 8 States. As far as the

earnings of the husband are concerned, while there may be legal, technical differences, the practical fact is that the husband that earns a salary of $100,000 in one State does just about the same with it as the husband that earns $100,000 in a community-property State. Therefore there are no practical reasons why the tax burden should not be equalized.

Mr. HILL. Of course, the community property laws, you say, in fixing the property rights as between husband and wife, impose an unjust burden on the other 40 States. Has your department made an investigation to determine what percentage of the husbands and wives as a marital unit in the 40 noncommunity States are evading the income-tax laws through one scheme or another whereby they separate their property and make separate returns?

Mr. BARTHOLOW. There has been no special investigation. Those matters, of course, appear from time to time in connection with the revenue agents' reports, but there is no way of taking——

Mr. HILL. Is it not a fact that schemes are resorted to in the other 40 States between husbands and wives purely for the purpose of separating their tax returns so that they may get a lower tax rate?

Mr. BARTHOLOW. There is no way for a husband in one of the 40 States avoiding paying tax on his full salary. Devices have been resorted to, such as the assignment of income, but the Department has consistently refused to recognize those devices and has been successful in the litigation up to the present. So that as far as the earnings of the husband—and that, of course, is the big item——

Mr. HILL (interposing). Have you not a number of treasury decisions and decisions from the Board of Tax Appeals involving just such cases where partnerships of husband and wife in non-community-property States have been formed resulting in allowing the spouses to file separate returns and thereby keep out of the higher brackets?

Mr. BARTHOLOW. There are cases pending. Where there is evidence that the partnership was formed for that purpose, the Treasury has not recognized it as a valid partnership.

Mr. HILL. Suppose it is not shown that it is formed for that purpose, but that that benefit results to the spouses; it would be the same situation as you are trying to remedy in the community-property States.

Mr. BARTHOLOW. If a wife actually contributes her separate property to the partnership and gives her services, then in a separate-property State she is entitled to a fair share of the profits on that account.

Mr. HILL. Suppose a husband in the State of Massachusetts has $100,000 worth of property and he gives $50,000 of it to his wife. Upon the basis of that division of the property they form a partnership and receive incomes as the earnings or the increment of that property. Would not the same result be obtained so far as avoiding the payment of taxes in the higher brackets is concerned as you are trying to remedy through this legislation?

Mr. BARTHOLOW. If a husband makes a bona fide, actual gift of property to the wife, then the income from the property so given thereafter is reported in the income-tax return of the wife. There is no way of preventing that, and of course that is as it should be, providing there is a real gift involved.

Mr. HILL. Yes; providing the gift is bona fide. There would not be any gift tax up to $50,000.

Mr. BARTHOLOW. On account of the personal exemption?

Mr. HILL. And after that he could give her property up to $5,000 a year without any gift tax.

Mr. BARTHOLOW. That is right.

Mr. HILL. You are not remedying that situation in this legislation?

Mr. BARTHOLOW. No. It all depends upon the point of view. If Congress saw fit to impose a gift tax on all gifts and to give no exemption, it would have done so.

Mr. HILL. Let us see about the point of view. In the community-property States, the law gives the wife this property and in the noncommunity-property States the husband gives the wife part. The title is vested in one the same as it is in the other, yet you propose to tax in the community-property States in one return, whereas in the noncommunity-property States you will let each one file a separate return and stay out of the higher brackets.

Mr. BARTHOLOW. As I understand, in most community-property States, property acquired after the marriage, by gift, devise, bequest, or inheritance is separate property.

Mr. HILL. That is true.

Mr. BARTHOLOW. In the case of such property, the income would generally be separate income, and that income would not be within the control of the husband.

Mr. HILL. I am talking about the community property, as to which the laws of the State determine the title to be one half in the wife and one half in the husband, and the title is vested just the same by operation of law as a title is vested by gift of the husband to the wife in the non-community-property State, yet in the community-property State you say the spouses must make one return of the income from the cummunity property, whereas in the non-community-property State you permit the wife and the husband to make separate returns.

Mr. BARTHOLOW. In the non-community-property States the wife would own that income, and she would have the full control over the income. In the community-property States there is no prohibition on the filing of separate returns. But the person who has the management and control of the income, and can spend it and use it as if it were separate income, should pay the income tax on such income as on his separate income.

Mr. HILL. It is not necessary for me to tell you that I have a very high respect for your legal ability, but I feel that you appreciate the fact that the title is vested as a matter of ownership, in the spouses in the community-property States to the same extent as the title to separate property in the non-community-property States is vested in the spouses. I am not going to argue that. I am sure that my friend, for whom we have the highest respect both as to his personal character and his legal ability, and particularly as to his knowledge in a very high degree of tax matters, does not disagree with that statement. I was trying to call your attention to a situation where, if this legislation is enacted, you would deny to the husband and wife in the community-property State, as to community income

of community property, the rights which by voluntary contract or voluntary action between the husband and wife in the non-community-property States may be exercised in keeping their income tax in the lower brackets through the separate returns. Now, we got side-tracked on that.

Referring again to the Hoeper case, and pursuing the same thought that I had in mind, and quoting again from the Supreme Court in the Hoeper case, it is said:

> Neither of the reasons advanced in support of the validity of the statute as applied to the appellant justifies the resulting discrimination. The exaction is arbitrary and is a denial of due process.

Now, of course, they were talking about the fourteenth amendment to the Constitution. You are familiar with the case of *Heiner* v. *Donnan* (285 U.S. 312). Let me say first that the Hoeper case went off on the point that the action of the State tax commission in Wisconsin in attempting to tax the husband on income measured not only on his income but that of the wife as well, was in violation of the fourteenth amendment. In the Heiner case, the court held that the fifth article of the Constitution, which also contains the provision as to due process, was a prohibition or restriction upon the powers of the Federal Government, just the same as the fourteenth amendment of the Constitution was a prohibition on the State governments. In the Hoeper case, the Court held that the action of the commission was in violation of the fourteenth amendment in that it violated the due process clause.

Here is a statement in that Hoeper case that seems to me very forceful, and it is a quotation from the case of *Knowlton* v. *Moore* (178 U.S. 41), at page 77, as follows:

> It may be doubted by some, aside from express constitutional restrictions, under the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.

And then, again, the Court in the Hoeper case said:

> We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law, as guaranteed by the fourteenth amendment. That which is not in fact the taxpayer's property cannot be made such by calling it income.

That language would apply equally under the fifth amendment of the Constitution to any effort on the part of the Federal Government to do the thing which was sought to be done in the State of Wisconsin. I think that is all.

Mr. FREAR. We have been here nearly an hour.

Mr. HILL. I would like to ask one more question. What is the present title of your official position in the Treasury?

Mr. BARTHOLOW. Special Assistant to the Secretary.

Mr. HILL. You say that these views you are presenting are the views or the opinions of the Treasury Department. Of course, the Treasury Department as a department is an inanimate thing, and must give expression through the personnel of the Department. Who formulates the policies or the opinions of the Treasury Department that you are here expressing?

Mr. BARTHOLOW. In a matter of this kind, it comes directly from the Secretary. The proposition has been discussed with the Secretary, and the position I indicate is the position he has requested be taken. Furthermore, as indicated by the memorandum put in the record yesterday by Mr. Parker and signed by Mr. Prettyman, the former General Counsel of the Internal Revenue Bureau, you will find the same views as to the constitutionality of the pending bill.

Mr. HILL. Let me ask this: Did you contribute to this opinion that the Secretary of the Treasury has expressed here through you?

Mr. FREAR. I will object to that; that is too indefinite. It carries a conclusion.

Mr. HILL. I will withdraw that.

I do not think I can pay a higher compliment to the witness than has been paid by the examiner, but we have the reverse of the ordinary procedure here in putting the witness in the position of the court. I take it that a witness or an attorney appearing before the court on a question of constitutional law should present his case. You have presented yours. Ordinarily, the court does not cross-examine the witness and I will not examine the witness to this same extent because it involves so many questions which I would like to go over. Take the *Hoeper case*, with which I am somewhat familiar. I know the judges of that court and they are very able men. Notwithstanding, they tried to sustain a case where the individual property was owned by separate parties. In a community property State today you would conceive that is a different condition of affairs, because in this bill it refers constantly to the martial community property. This bill throughout, in 3 or 4 different places, refers to the marital property each person has under the law of the community property States.

Mr. BARTHOLOW. That is right.

Mr. FREAR. That is the distinction between this and the Hoeper case. You listened here yesterday when the statement was made to the committee that between 40 and 60 million dollars would be collected by the Federal Government if the same procedure was required in the community-property State that is required in the other 40 States. That is a fair statement?

Mr. BARTHOLOW. That statement was made.

Mr. FREAR. You heard the statement?

Mr. BARTHOLOW. Yes.

Mr. FREAR. It was made here yesterday. I am making a record for the purpose of finding out what we are doing. It has not been disputed so far before the committee?

Mr. BARTHOLOW. Not as yet.

Mr. FREAR. You were present with the original subcommittee, with the attorneys for the committee, who were of the same general mind, taking the same position; is not that right?

Mr. HILL. What attitude did you take before the subcommittee?

Mr. BARTHOLOW. We are getting back to the same question which I was excused from answering a moment ago.

Mr. FREAR. You represent here the Secretary of the Treasury?

Mr. BARTHOLOW. I do.

Mr. FREAR. The Secretary of the Treasury has directed you to come here to present these views?

Mr. BARTHOLOW. He has.

Mr. FREAR. And you, as a conscientious man, are, I assume, performing the ordinary duties of an attorney representing the Federal Government, not any one State, but the Federal Government only in this case; is that right?

Mr. BARTHOLOW. That is right.

Mr. FREAR. There are 40 to 60 million dollars involved at this time, to date, in this question, unless it is disputed as to the amount, because of these laws, one the community-tax laws for the States and the other the general law, which causes the Treasury Department to make the assessments as it does, and I want you to interrupt me if I make a mistake, because I do not want to do that. If that be true, would it be well to let the Supreme Court determine that question, the Supreme Court of the United States?

Mr. BARTHOLOW. That is the attitude of the Treasury.

Mr. FREAR. Would you expect this subcommittee to determine the question ordinarily, constitutional questions of that importance?

Mr. BARTHOLOW. I am afraid that is beyond my province to answer.

Mr. FREAR. Of the Treasury Department?

Mr. BARTHOLOW. One of the questions presented is constitutional, and the other is the fairness or merit of the pending bill.

Mr. FREAR. Yes; we are trying to determine both, because the claim is made by those who have appeared before the committee that if these community States are required, and their representatives are here very strongly, and I am glad they are here, to pay the same as they pay in my State and the other 39 States, they will pay from 40 to 60 million more in taxes on the same basis. Is that a fair question to take before the Supreme Court?

Mr. BARTHOLOW. I think it is a fair question to put to the Court, or I would not have taken the position I have.

Mr. FREAR. Naturally. The question was raised whether or not there were evasions by wives in the noncommunity State, either by partnerships or by other devices, to avoid the payment of the joint assessment and the payment of the extra surtax. That question was asked you?

Mr. BARTHOLOW. Yes.

Mr. FREAR. The Treasury Department tries to prevent evasions of tax, does it not?

Mr. BARTHOLOW. That is its duty.

Mr. FREAR. That is your duty, and when that matter is brought before you and you ascertain that has come about, then you challenge the tax in each case?

Mr. BARTHOLOW. Yes.

Mr. FREAR. The purpose of this subcommittee and of the Ways and Means Committee, sitting at this time, in this way, has been to prevent tax evasion, is it not?

Mr. BARTHOLOW. That was the main purpose of the 1934 revenue bill drafted by the committee.

Mr. FREAR. So that is one of the questions that arose with the subcommittee, but went out because of the controversy that arose on the constitutional question; that was discussed openly before you?

Mr. BARTHOLOW. It was.

Mr. FREAR. Your judgment, representing the Treasury Department, is that this bill, known as bill 8396, will be held constitutional by the Supreme Court?

Mr. BARTHOLOW. That is the judgment of the Department.

Mr. FREAR. And you are representing the Department?

Mr. BARTHOLOW. I do.

Mr. FREAR. If that is a fact, would you say this subcommittee has a right to disregard not only the Department, but the right to be heard as to the constitutionality by the proper court, the Supreme Court of the United States?

Mr. BARTHOLOW. I should prefer to let the committee pass on that question.

Mr. FREAR. You people are presenting this case.

Mr. BARTHOLOW. Yes. In the judgment of the Department, it is felt that the chances are in favor of the legislation being sustained. It is up to the members of the committee as to whether they concur in that judgment. The Department must admit that the question has many angles, but it is believed on the whole, the legislation will be sustained. Under those circumstances, the committee members can form their own judgment.

Mr. FREAR. This is not to be determined by 5 men on this subcommittee chosen, many against their own protest, and the next session you can bring 5 more men and continue this until the proper power that represents the United States makes the law; is not that right?

Mr. BARTHOLOW. That is right.

Mr. FREAR. So, no position by this subcommittee is going to determine the constitutionality.

Mr. BARTHOLOW. No.

Mr. FREAR. I do not intend to cross-examine you; you have made a study of this subject constantly for a long period, have you not?

Mr. BARTHOLOW. Yes.

Mr. FREAR. Representing the Department, and so have the other attorneys. I do not intend to cross-examine them as to the law but the court to determine it is the Supreme Court of the United States.

Mr. BARTHOLOW. It is.

Mr. SHALLENBERGER. We thank you very much, Mr. Bartholow.

Mr. HILL. The question of tax evasion was mentioned to you by Mr. Frear. Of course, it is the duty of the Treasury Department to check up on the evasions and prevent them when they are found, but there is a distinction between an illegal evasion and the legal avoidance of a tax.

Mr. BARTHOLOW. I was going to say I believe Mr. Frear had in mind avoidance rather than evasion. Those two terms are sometimes used indiscriminately. If a mere case of evasion, the Department would not have needed any new tax bill. The revenue bill of 1934 was formulated to put an end to certain legal methods of tax avoidance, in order to assist the Department to get more taxes. As to preventing evasion, the Department has the power without additional legislation to do that.

Mr. HILL. But it is not legislation to authorize you to check up and stop illegal evasion, but it is legislation to enable the Treasury Department to prevent legal avoidance.

Mr. FREAR. The question I presented here was: It is conceded that the community-tax law protects them at this time. No one has questioned that, or you would not have this bill.

Mr. SHALLENBERGER. Has the Supreme Court definitely agreed that the wife's income can be taxed to the husband because he manages and controls it?

Mr. BARTHOLOW. That question has not been directly passed upon, but attention is directed to the obiter dicta in the Robbins case in which the Court, assuming for the purpose of argument that the wife in California had a legal vested interest in the community income, indicated that Congress could tax the whole of such income to the husband.

Mr. SHALLENBERGER. That is the matter at issue.

Mr. BARTHOLOW. That is the very point.

Mr. SHALLENBERGER. That has not been decided definitely by the Supreme Court.

Mr. BARTHOLOW. No.

Mr. HILL. What did the Supreme Court say in the later case?

Mr. BARTHOLOW. That was when the California law had been changed so that one-half of the community income was actually vested in the wife. Then there was in effect a Federal revenue act which, the Court said, imposed the income tax solely according to the ownership of income. The purpose of the pending bill is to change this principle so that ownership will not be the sole basis for imposing Federal income taxes.

Mr. SHALLENBERGER. Thank you very much. We will next hear Mr. Monarch.

STATEMENT OF J. L. MONARCH, DEPARTMENT OF JUSTICE

Mr. SHALLENBERGER. Will you please state your representative capacity and your full name?

Mr. MONARCH. My name is J. L. Monarch. I appear as the representative of the Department of Justice, in response to the request of this committee.

It was only night before last that the Department of Justice or I had an opportunity to see this bill which is now pending before you. The opportunity for preparation has been rather limited. We have given careful study to the bill, however, and we realize that there are possible objections that may be made to it.

As I understand the purpose of the bill is to eliminate what is thought to be a preferential treatment now given to husbands in community-property States, where the community-property system puts the spouses in a somewhat different relation as to property than is the case in the other States. That system makes it possible for the husband in the community-property States to divide his income in two, and report one half in his Federal tax return, the other half being reported by his wife. In order to eliminate that practice, the purpose of this bill, as we understand, is to require the return to be made by the spouse who has control and management of the income, it being understood that under the community-property system the power and management of the husband is practically an unfettered control over the income from the community property.

There appear to be two possible objections to this bill, as we see it. Instead of being permitted, as is now the practice, to report one half of his income, the husband in community States will now report it all, but in addition, he will report the income earned by his wife and, in some States, as we understand, he will also report the income from the wife's separate property. Such a situation, of course, would undoubtedly cause litigation and the claim would be made that the inequality resulting would render the statute invalid under the due-process clause of the fifth amendment. We have examined the cases which appeared to be most nearly in point, all of which have been presented here. There is no case directly decisive of the question. The nearest case in point appears to be the Hoeper case, which involved the Wisconsin income tax law, the particular provision being that the income of members of a family residing together should be reported by the husband or the head of the family, with the result that the aggregate income reached into higher brackets than if the income had been reported by each of the earners. That resulted in the Hoeper case in Mr. Hoeper paying a larger tax than would have been due if the tax had been computed on his personal income alone, and he challenged the validity of that statute, claiming it was discriminatory and arbitrary and, therefore, repugnant to the due-process clause of the fourteenth amendment. The Supreme Court upheld this contention with three members of the court dissenting. But in the discussion leading up to the decision in that case, the Supreme Court made certain observations which encourage the belief that the present bill, if enacted into law, would present a somewhat different situation.

Mr. HILL. Which case are you referring to?

Mr. MONARCH. *Hoeper* v. *Tax Commission of Wisconsin* (284 U.S. 206).

Mr. SHALLENBERGER. When you said "upheld this contention", what did you mean?

Mr. MONARCH. It upheld the claim of the invalidity; they held the statute invalid, under the fourteenth amendment. The Supreme Court referred to the fact that the husband in the Wisconsin case never had any ownership of the income of the other members of the family group, that he never had any control over it, that it was never subject to his management, and that he got no benefit directly from it. The Court made some allusion to the situation which would be presented if the conditions in Wisconsin were more nearly analogous to the old common-law situation, and the Court in that case said this: At common law, the wife's property, owned at the date of the marriage, or in any manner acquired thereafter, is the property of her husband. Her earnings and income are his; he may dispose of them at will, and he is liable for her debts. Were the status of a married woman in Wisconsin that which she had at common law, the statutory attribution of her income to her husband for income-tax purposes would, no doubt, be justifiable. That language lends encouragement to the belief that in any State where the earnings of a wife are under the control of the husband so that for all practical purposes he gets as much benefit from it as though it were his own, or at least he gets considerable benefit from it, that sort of situation would present a different picture entirely than was presented by the Hoeper case. It lends encouragement to the belief that the statute

would escape the condemnation which was attached to the Wisconsin statute.

The imposition upon the husband under this bill of a tax computed by adding the earnings of the wife to his own could, of course, be largely eliminated if this bill should be amended to provide that so far as salaries were concerned, so far as the income from personal service was concerned, each spouse should report his or her own earnings. That would, we think, completely eliminate any question of validity, so far as the taxation of salaries is concerned. We suggest that this committee should consider the advisability of adopting such an amendment.

With respect to the States which require the inclusion in the community property of the earnings of the wife's independent property, of course, that objection could still be made to the bill, and it cannot be said with any certainty what the result would be.

Mr. Hill. Will you explain what you mean by that statement?

Mr. Monarch. I mean by that statement that the objection could be made that the husband was required to pay a tax, measured not only by his own income but by income from property over which he had no control. Speaking now of income from the wife's independent property, which we understand in some community-property States is added to the community property. That objection would not obtain in other States where we understand the situation is different, and the income from the wife's independent property is never brought into the community.

We would also suggest that the committee consider the advisability of striking out the words on lines 5 and 6, "Property of a marital community shall be considered as the property of and". The justification for this legislation, as we understand it, is that the husband has the control and management of the income which is to be taxed, and it seems to us that the bill would lose none of its force and none of its scope if the reference to his control and management of the property, as distinguished from the income, were eliminated, and it might conceivably avoid some complaint that the control and management of the property was no justification for a tax upon the income.

Mr. Frear. And in direct conflict with the laws of the community-property States today, which say that the property belongs to both.

Mr. Hill. For the benefit of those present, would you restate the proposed amendments or suggestions?

Mr. Monarch. The suggestion I made earlier was an amendment which would provide that the earnings of each spouse, earnings from personal services, such as salary, wages, and compensation, should be taxable to the individual spouse who contributed the service and earned the income, rather than going into the community estate and taxing the one who had control and management over the aggregate. The other suggestion which has been made was that the words beginning on line 5——

Mr. Hill. Beginning after 1933?

Mr. Monarch. Yes; and striking out the remainder of that line and all of line 6 up to and including the word "and", making the bill read: "That for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, income of a marital community shall be considered as the income of the spouse who has the management and control thereof, and so forth", leaving out the reference that the property of the marital community should be attributed to the husband.

When you analyze the situation in the community-property States, it is the enjoyment of the income which the husband has which appears to be the justification of this legislation.

It is therefore suggested that the committee consider adding in line 8, after "control" the words "or enjoyment", making it read "management and control or enjoyment".

In our brief study of this legislation it has occurred to us that there might be a way to accomplish what the committee desires under a wholly different approach to this question than is presented by the bill, and we offer for the consideration of the committee an alternative proposal for the whole bill. It is based on this theory: That community property, as we understand it, is built up during the marriage by the earnings of the individual spouses and, in some cases, the earnings from their property. In every case, the community property is identified with one or the other of the spouses, through whom it finds its way into the community. Our thought was if the identity could be preserved and the income from that property which had found its way into the community through a particular spouse could be attributed to that spouse, then you would avoid any objection such as can be made to this bill that there is a building up and adding of one person's income on top of another's with a consequent larger tax than would otherwise be the case. We therefore have suggested that in the case of salaries, the spouse who earns the salary should be taxable. In the case of earnings from other property of the separate spouse, which finds its way into the community, that the earnings be attributed to the spouse through whom it came into the community, and that with respect to community property which has been acquired by accumulations built up over years, that the income from such property should be attributed to each spouse in proportion as he contributed to the acquisition of the property.

We have submitted a copy of these suggestions to the Treasury Department, and we understand that they are studying them. Of course, it should be stated that these suggestions have not received the mature consideration which would be necessary to give a formal and final approval. We think they have possibilities and that they would remove definitely the objections that have been made here. Further study may show that there are some objections that are not apparent at this time. It may even result that the administrative difficulties would be too great to justify it. We think the suggestions have possibilities and we submit them for what they are worth.

(The memorandum referred to is as follows:)

Notwithstanding any State law dealing with the marital community:

(a) Salaries, compensation, wages, etc., arising from the personal services of each spouse shall be considered as his individual income;

(b) The earnings from community property, so-called, shall be attributed to and considered as the income of the spouse through whom the property came into the community;

(c) Where the earnings of both spouses are used to acquire community property, the earnings of such property shall be attributed to each spouse in the same proportion as his earnings entered into its acquisition.

Mr. Monarch. So far as the taxation of the salary to the one who earns it is concerned, we think that any question of the validity of such legislation is foreclosed in view of the decision in *Lucas* v. *Earl*, which dealt with the California husband and wife who made an agreement to divide their earnings. The Supreme Court in that case held that it was competent for Congress to require that the earner of income pay the tax upon it, no matter what disposition was made of it after it was earned. We think, in view of that decision, there can be no question of the validity of attributing the earnings to the spouse who performed the service.

Mr. Frear. These are new suggestions, and I can see that they are helpful, particularly in that one case where language may be stricken out, unless the purpose would be to identify what is known as property under the community State laws. I do not known whether that is the purpose; I never saw this before I sat here yesterday. As I understand from that proposition which you say was upheld by the Supreme Court of the United States, it is, in effect, that a husband who receives $50,000 salary today would be taxed on the $50,000 outside of his exemptions?

Mr. Monarch. It is all attributed to him.

Mr. Frear. Under the community-tax States, as I understand, that $50,000, with the other, is divided equally between the spouses?

Mr. Monarch. They each have an interest in it.

Mr. Frear. What I mean to say is, their tax is based upon the division of that $50,000 to each?

Mr. Monarch. That is true, and the reason for that is that the statute, as it now stands, makes the tax dependent upon ownership and requires that the income be attributed to those who own it. The purpose of this amendment would be to make a different test and attribute the earnings from personal service to the one who earns it, irrespective of who may own or control it by operation of law, contract, or assignment.

Mr. Frear. That seems to be the purpose of the bill, to reach the one who has the $50,000 salary, or whatever it may be, so he cannot divide it into two parts and escape the surtaxes which go with the higher brackets. The alternative, as I view it, and I may be mistaken, if the community States, by reason of the advantage which it is urged they have in this, are able to prevent the collection of what is estimated at 40 to 60 million, the other 40 States, in order, necessarily, to be placed upon an equal footing, ought to adopt the community-tax laws, and would be saved thereby between two or three hundred millions and maybe more, to the people of my State and the other States. This gets to be a selfish State situation. There is no criticism intended; everyone representing the States has the right to be here. But is not that the alternative, that the other 40 States would necessarily have to adopt the community State laws?

Mr. Monarch. That would result in uniformity.

Mr. Frear. The only way the Treasury Department could recoup would be by increasing the tax rates.

Mr. Monarch. That is right.

Mr. Frear. So that the tax rates would then reach back into the community States and they would have the additional rates to pay, where, as it is today, they get the same rates as the other 40 States.

Mr. Monarch. That is true.

Mr. Hill. Following that thought that Mr. Frear has presented, as an alternative, why not tax the incomes of husbands and wives on the theory of the common law? Why not fall back on the common law, instead of having the 40 States adopt the community-property law? That would be another way of solving it.

Mr. Monarch. I do not believe I understand what you mean.

Mr. Hill. Under the common law, the property which the wife brings into the marital union becomes the property of the husband, does it not?

Mr. Monarch. That is right.

Mr. Hill. If you put all the States back on that basis for tax purposes, you would have equality.

Mr. Monarch. I do not understand how the Federal Government could put them back on that basis.

Mr. Hill. If the Federal Government can tax the incomes of spouses in community-property States on the same basis as if they were under the common law, why cannot you tax the spouses in all the States on that same basis?

Mr. Monarch. If you could find some basis for classification that would accomplish that, it could be done. Offhand, I do not think of any basis for classification on which the reverse of what is sought to be done here could be accomplished. There is a difference in the community-property States which would justify a different classification than is now in existence. If there is a similar basis for a classification which would require all States to report on the common-law theory of ownership in relation to property of the spouses, then such a classification might be adopted and put all States on the same basis.

Mr. Hill. Do you recognize the right of a State to determine and fix the status of property rights between the husband and wife?

Mr. Monarch. Certainly.

Mr. Hill. And that power in the State is exclusive of the Federal Government?

Mr. Monarch. So far as their interests between themselves, as affecting their rights in and to property are concerned, yes.

Mr. Hill. That is what I am talking about. The State has the exclusive power to determine the status of property rights between husband and wife.

Mr. Monarch. Yes.

Mr. Hill. Now, in these community-property States, the States have done that very thing. In non-community-property States, the States have likewise determined and fixed the status of property rights between husband and wife. Since they have that exclusive power, and through the exercise of that power they have determined what property is in the ownership of the wife and what property is in the ownership of the husband, what authority is there for the Federal Government to come in and say they will disregard that determination by the State for taxation purposes?

Mr. Monarch. I do not understand this legislation proposes to upset the rules of property of the community-property States or that it attempts to disturb them in any way. It says that hereafter, instead of looking to the owner to determine who is going to account for income we will look to the one who has the management and

control, and perhaps enjoyment, if it be decided to include enjoyment. That is not in conflict with the concept of property rights.

Mr. HILL. Do you think the Federal Government has the right under the sixteenth amendment to levy income taxes upon any basis than ownership of property and of income?

Mr. MONARCH. Yes.

Mr. HILL. Will you give us a few instances?

Mr. MONARCH. The revocable trust cases are instances of that, where property formerly owned has been transferred but a string has been kept on it. In the *Corliss-Bowers case*, the husband had created a revocable trust.

Mr. HILL. Revocable or irrevocable?

Mr. MONARCH. A revocable trust, for the benefit of his wife. He did not get the income, but he had the right to get it by revoking the trust. For that reason, the court said the income could be attributed to him.

Mr. HILL. Do you think that is analogous to the situation as between the property rights of spouses in a community-property State?

Mr. MONARCH. I think there is some analogy; I recognize there is some difference.

Mr. HILL. The analogy is rather strained or remote, is it not?

Mr. MONARCH. I think the analogy is in this, that whereas in the revocable trust the husband does not actually enjoy the income, but has a right to enjoy it, in the community-property States, while the wife has a vested right, perhaps, in the income, nevertheless the husband is enjoying it.

Mr. HILL. Now, suppose I should receive an income of, say, $15,000 and I should give you $5,000 of it, I would be charged with the tax upon the income of $15,000. I have it in my power to give you that this year and not give it next year. I have absolute control of it. That is true in the case of the revocable trust. The creator of the trust says, "I create a trust here, the proceeds of which will go to my wife, but I retain the right and the power to revoke that trust at any time; I have absolute control of it." He could revoke that trust whenever he felt like it, or at least within the terms of the trust, and that is certainly dissimilar in every respect from the situation as between the spouses in the community-property States, where the husband has no right, no vested property right in the wife's part of the community estate, but under the law of the community-property State, he is vested with the right of management and control, subject to revocation by the legislature of the State. In other words, he has no right to revoke the actual vested property right of the wife in the community estate, whereas under the trust example you gave he has a right to revoke her interest in the trust estate. That is fundamental, is it not?

Mr. MONARCH. Not necessarily. If the enjoyment is there, what difference would it make where the right was?

Mr. HILL. What do you mean by "enjoyment"?

Mr. MONARCH. I mean if the husband in the community-property estate is vested with the power of control and management to the extent that he can directly exclude the wife from all benefit from the income.

Mr. HILL. He cannot do that in any community-property State.

Mr. MONARCH. I have not very complete information about the community-property laws. I understood that was generally the situation. Miss Carloss, who is to follow me, has made a study of the community-property laws of the several States, and is prepared to discuss the variations in them and the powers of the husband.

Mr. HILL. Let me suggest to you that the management and control of the husband in the community property is the management and control of the community estate. It is part his and part the wife's. He has management and control of that, although it is controlled under the law for both himself and his wife, as marital community property.

Mr. MONARCH. As I understand, the justification for this bill is that the power of control and management in the husband is so definite and so substantial that there is a legal basis for attributing the income to him. I take it that the legislation will stand or fall on the correctness of that premise. If the husband has no rights in the income which are sufficiently valuable, I suppose the legislation will be bad. The premise is that the husband has such an interest in this income that it is proper for Congress to attribute it to him.

Mr. FREAR. In that connection, any effort to take a $50,000 salary and divide it between the husband and wife, by the State law which contravenes the general law, would be a confiscation to that extent. The Federal Government would lose that proportion of the surtaxes which would ordinarily be paid.

Mr. MONARCH. Yes.

Mr. HILL. The States in exercising the power to determine and fix the status of property rights between husband and wife have greatly modified, in most of the common-law States, the status of the property rights between the husband and wife. In other words, the old common-law rule under which the property which the wife brought into the marital union became the property of the husband has been abolished in most of the States, has it not?

Mr. MONARCH. I think so.

Mr. HILL. In abolishing that rule, the wife is enabled to acquire and hold and own and dispose of her estate separate and apart from the husband. In many cases, at least, that is true. She has a separate income and he has a separate income on which he makes a separate return of the income and thereby keeps out of the higher brackets; he keeps out of the higher brackets that would be reached if the income of both were included in one return. But under the old common-law rule, all of the income from all the property of both spouses, and all of their earnings, the wife's earnings as well as the husband's earnings would all go into one return and be chargeable to the husband. Is not that true?

Mr. MONARCH. Do you mean under the present statute?

Mr. HILL. Under the old common law.

Mr. MONARCH. It would depend on what the taxing statute made the basis of the tax.

Mr. HILL. I am assuming this: That the tax would be levied upon the income of the person having the legal title to it.

Mr. MONARCH. If that were the basis, then it would all be taxed to one.

Mr. HILL. Is not that the basis of the income tax?

Mr. MONARCH. That is the basis of the present statute; that is not necessarily the only basis for it. In other words, as I have already suggested, there is no constitutional objection so far as we can see, to Congress requiring the one who earns the money to report it as his own income. In other words if the wife is employed on somebody's pay roll and gets a salary, Congress would be justified in requiring her to return it as her income, notwithstanding it went through her into the community and that the husband acquired an interest in it.

Mr. HILL. Regardless of whose property it is?

Mr. MONARCH. Regardless of whose property it is.

Mr. HILL. That is your conception of the constitutional powers of the Federal Government in the matter of taxation?

Mr. MONARCH. Yes.

Mr. HILL. Did you refer to the Earl case?

Mr. MONARCH. Yes.

Mr. HILL. Let me read you a paragraph from the decision in that case, as quoted in Poe against Seaborn:

> In the Earl case a husband and wife contracted that any property they had or might thereafter acquire in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise, shall be treated and considered and hereby is declared to be received, held, taken, and owned by us as joint tenants. We hold that assuming the validity of the contract under the local law, it still remained true that the husbands' professional fees, earned in years subsequent to the date of the contract, were his individual income derived from salaries, wages, or compensation for personal services under sections 210, 211, 212 (a) and 213 of the Revenue Act of 1918.

Then the court further says:

> The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here by law the earnings are never the property of the husband but that of the community.

The Supreme Court has given voice to that principle.

Mr. MONARCH. As we understand that it is a distinction of *Lucas* v. *Earl* which does not affect its validity. In other words, the Supreme Court says that the test which this statute adopts is ownership; it says the income which is to be taxed is the income "of" somebody; that denotes ownership. There is no definition of ownership in the Federal law. Therefore, you look to the State law to find the one under those circumstances who has the ownership, which determines and controls who pays the tax. That case does not overrule or weaken the Earl case, as we understand. It depends entirely upon the theory of the taxing statute which required recourse to the State law to find out who the owner was.

Mr. HILL. The sixteenth amendment of the Constitution of the United States provides:

> The Congress shall have power to levy and collect taxes on incomes from whatever source derived, without apportionment among the several States and without regard to any census or enumeration.

You would not go so far as to say that ownership does not enter into the question of on whom this tax should be levied?

Mr. MONARCH. The courts have said that the sixteenth amendment provides no test of whose income is to be taxed. It provides for a tax on income. So far as the sixteenth amendment is concerned, it has been held that Congress is free to tax income——

Mr. HILL (interposing). To what case are you referring?

Mr. MONARCH. The United States Circuit Court of Appeals for the Second Circuit, said that in Taft against Bowers.

Mr. HILL. Give the citation.

Mr. MONARCH. 20 Fed. (2d) 561. It was afterwards affirmed by the Supreme Court. I am speaking of the decision of the circuit court.

Mr. HILL. Do you know the citation of the Supreme Court case?

Mr. MONARCH. I can supply that to you.

Mr. HILL. Please put it in the record.

Mr. MONARCH. I can get it for you; it is Two hundred and seventy-eighth United States Reports, page 470.

Mr. SHALLENBERGER. We were going to take up the next witness, but Congress is ready to convene, and we will adjourn to meet again tomorrow morning at 10 o'clock, in this room, and continue the hearing. The next witness will be Miss Carloss.

(Thereupon, at 11:50 a. m., the committee adjourned until tomorrow, May 3, 1934, at 10 o'clock a.m.)

COMMUNITY PROPERTY INCOME

THURSDAY, MAY 3, 1934

House of Representatives,
Subcommittee of the Committee on Ways and Means,
Washington, D.C.

The subcommittee met at 10 o'clock a.m., Hon. A. C. Shallenberger (chairman) presiding.

Mr. Shallenberger. The committee will be in order.

Mr. Frear. May I say, addressing my remarks to the chairman and to Mr. Hill, that we are trying to arrange things to accommodate Members of Congress interested in these hearings either for or against the proposed bill.

It is agreed that the experts who are here will first be heard and we will then notify Members so that they may be heard following them.

Speaking for myself, I have been working here practically continuously since the 1st of October, nearly every day. We have just finished hearings with the unemployment insurance subcommittee. Some of us have to be away some of the time and we should like that witnesses should understand that while we are very glad to hear them, there are times when we must be somewhere else. I should especially like to be here when the proponents of this legislation, who are Members of Congress, make their statements.

Mr. Shallenberger. Mr. Frear, I will say that it will be the policy of the committee to hear from the experts first and then we will hear Members of Congress who want to make statements on this proposed legislation. The clerk will notify the Members sufficiently in advance so that they may be prepared when we are ready to hear them.

The first witness this morning is Miss Helen Carloss, from the Department of Justice.

STATEMENT OF MISS HELEN CARLOSS, DEPARTMENT OF JUSTICE

Mr. Shallenberger. Will you please state for whom you appear, Miss Carloss?

Miss Carloss. I am here for the Department of Justice and my remarks will be limited to a discussion of some of the features of the particular community property laws that have been under discussion here.

Mr. Monarch spoke on the constitutionality of the provisions. I have nothing to say about that. My remarks are entirely directed to the laws themselves and some of the incidence of the laws that may have a bearing on this proposed legislation.

Mr. Cochran. Mr. Chairman, this record is not made solely for the benefit of this committee. This committee is composed of three lawyers and two other members who are not lawyers. I am going to suggest, for the benefit of the members of the committee who are not lawyers, and for the benefit of the Members of the House who are not lawyers, that someone of these attorneys give a very careful and detailed explanation of what constitutes a marital community.

Mr. Shallenberger. You mean define the term marital community.

Mr. Cochran. Yes, in detail.

Mr. Shallenberger. Are you prepared to give us a definition of that term, Miss Carloss?

Miss Carloss. I have not considered a definition. I should say offhand that it is a community of gains and profits belonging to husband and wife which exists so long as a marital status exists and is terminated with its termination.

That is a rough definition. I had not considered the matter.

I would like to say first of all that my time for preparation on this has been very short; but I wrote the original draft of the briefs in the five community-property cases in the Supreme Court. I have reviewed the material that we secured at that time in regard to the laws of those five States, Washington, Texas, California, Louisiana, and Arizona.

I have not given any consideration whatever to the other three States and also I have not had an opportunity to see if there have been any changes in the law since those cases arose in 1930.

Mr. Cochran. Will you please name the other three States, inasmuch as you have named five of them?

Miss Carloss. The other three States are New Mexico, Nevada, and Idaho.

Mr. Shallenberger. In connection further with the suggestion made by Mr. Cochran that we have a legal definition of that term, of course, it is unfair to ask you to give it to us offhand. Will you, when you revise your remarks, insert a legal definition from your Department, of that term?

Miss Carloss. Yes, sir.

Mr. Hill. May I suggest that I think it would be rather difficult to improve upon the definition Miss Carloss has given us?

Miss Carloss. Thank you.

Mr. Shallenberger. At any rate, whatever you think is a proper definition, will you see that it is in the record?

Miss Carloss. Yes, sir.

Mr. Cochran. And some elaboration of it.

Mr. Shallenberger. Yes. Thank you for the suggestion.

Miss Carloss. I shall do that.

(The following was subsequently submitted for insertion in the record:)

"Marital community" and "community property" are terms applicable exclusively to eight States of the Union which inherited the community-property system from the Spanish or French law and recognize the husband and wife as a marital group.

McKay, Community Property, second edition, section 4, contains the following definitions:

"The term 'community' implies an association of persons. The marital community is a group of persons consisting of husband and wife. Community property is simply the property that belongs to this group."

The general rule of what constitutes community income in all of the States is that it is property acquired by the spouses during coverture, except property acquired by gift, devise, or descent. There are some modifications which I shall speak of, but that is a general working rule.

On the other hand, property owned by the spouse before marriage or that acquired by them after marriage by gift, devise, or descent is ordinarily separate property.

The separate earnings of the wife in these five States constitute community income except that in Arizona, California, and Louisiana, her earnings, while living separate and apart from her husband, constitute her separate property.

The rents and revenues of the wife's separate property in Arizona, California, and Washington, constitute her separate property. In the State of Texas there is a provision in the State constitution defining the separate property of the wife, and in virtue of that provision the Supreme Court of Texas held, in *Arnold* v. *Leonard* (114 Texas) that an attempt by the State legislature there to make the rents and revenues of the wife's separate property her separate property was unconstitutional.

So, in Texas, the rents and revenues of the wife's separate property are community property, which is different from the situation in other States.

Mr. Hill. May I ask you a question there?

Miss Carloss. Yes.

Mr. Hill. What is the situation in Texas as to the earnings or the rents and revenues of the separate property of the husband?

Miss Carloss. I can only state it this way. The law itself provides that they shall be his separate property. Now, I do not believe that that has been tested yet in the courts as to whether it is constitutional or not. Personally, I can see no reason why it would be unconstitutional, because the Texas constitution defines the wife's separate property but does not define the husband's separate property. There is a provision in the Texas law which says that the rents and revenues of the husband's separate estate shall be his separate property.

Mr. Hutcheson. May I interrupt on that point, merely to say that there is an amendment that makes all income from separate property community income now in the State of Texas.

Miss Carloss. That is since 1930?

Mr. Hutcheson. Yes.

Miss Carloss. So that the rule in Texas is the same as to the husband and the wife, the earnings from separate property are community income. That probably does not apply to the proceeds from the conversion of separate property. That probably still is separate property.

In Louisiana there are different kinds of separate property of the wife and property that they call her "paraphernal" property, which is property acquired after marriage, as her separate property. If it is left to the management of the husband or is managed by her and her husband indifferently, the rents and revenues of that property become community property. Otherwise they remain her separate property.

So the situation in Louisiana is a little bit complicated. It is a little difficult to say just to what extent the income from the wife's separate property is community income. But we know that part of it is and part of it is not.

In the other three States, as I have said, all income from separate property is separate property.

I take it that one of the important considerations in connection with this bill is what management and control the husband has. In the State of Texas his control is broader than in any other State, and in Louisiana it is more restricted than in any other State. In the other three States it comes in between.

In the State of Texas practically the only restriction is that he cannot intentionally defraud his wife. There is no restriction as to his right to convey the community real estate or the community personal property. He may enter into any kind of a contract or incur any kind of a debt relating to the community property and the community is bound.

Mr. HILL. That does not include a contract for the sale of real estate; you do not mean that, do you?

Miss CARLOSS. That is true in Texas except as to the homestead.

Mr. HILL. Are you confining your statement in this regard to Texas?

Miss CARLOSS. In Texas. In Texas there is no restraint on his conveyances of either real or personal property or any kind of contract he may make in regard to them. The one restriction is that he cannot intentionally defraud his wife.

Mr. FREAR. Does the wife sign the deed of transfer of real estate?

Miss CARLOSS. No, sir.

Mr. FREAR. She does not?

Miss CARLOSS. She is not required to except as to the homestead.

Mr. COCHRAN. Does the wife, in the State of Texas, have the same right of alienation that the husband has, of community property?

Miss CARLOSS. No, sir; the husband is the agent of the community, and he and he alone is the one who has the right to make contracts in regard to it, except this: The wife may contract for necessities under some circumstances, and the community will be bound. I take it that is no different from the rule that exists in common-law States.

Mr. SHALLENBERGER. I would like to ask one question on that. I never heard that statement made before. You say that in the State of Texas the law of the State is that this community property is jointly owned by the husband and wife, yet the husband can convey the real estate without the signature of the wife?

Miss CARLOSS. Yes, sir; he may.

Mr. SHALLENBERGER. Except the homestead?

Miss CARLOSS. Except the homestead; yes, sir.

Mr. SHALLENBERGER. Under what sort of construction of law do they permit a situation of that kind, so far as the status of the wife is concerned?

Miss CARLOSS. This is one of the features of this civil system of law, I suppose.

Mr. SHALLENBERGER. In that State?

Miss CARLOSS. Yes.

Mr. HILL. You are confining it to the State of Texas?

Miss CARLOSS. I am confining that remark to the State of Texas, and I say that there the husband's powers are broader than in any other State.

In the States of Arizona and Washington, the husband cannot convey the community real estate without the wife's consent. She has to join in the deed. That is in Arizona and Washington.

I should like, however, to refer to the statutes of Washington which, in other respects, give the husband quite a broad power. Sections 6892 and 6893 of the Revised Statutes are the ones to which I have reference. Section 6892 relates to the husband's control of personalty and says this:

> The husband shall have the management and control of community personal property with a like power of disposition as he has of his separate personal property except he shall not devise by will more than one half thereof.

In section 6893 they say:

> The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered.

And so forth.

Now, in the State of Washington there is this qualification also on the husband's power to bind the community property by contracts and debts. The community property is not liable for his separate debts, but there is a prima facie presumption that every debt he incurs and every contract he makes is made with reference to the community property.

I would like to illustrate that and show the extent to which they will go in holding that a debt is a community debt, by a particular case. This is the case of *De Phillips* v. *Neslin* (139 Washington 51). In that case the husband was managing a business which constituted a community business; that is to say, it was community property. He falsely charged an employee with larceny and made an assault on him. The employee brought an action for malicious prosecution and for assault. The court there held that the community fund was liable for the payment of these damages, that the property which was concerned was community property, and therefore the community was responsible for the payment of the debt.

Mr. HILL. That is, the charge was that the larceny involved community property?

Miss CARLOSS. Yes. That illustrates the extent to which they go in holding the husband's debt as a community debt.

Mr. FREAR. It would not affect, however, her individual property?

Miss CARLOSS. No, sir.

Mr. FREAR. That is, the judgment?

Miss CARLOSS. No, sir.

Mr. SHALLENBERGER. May I ask a question there? In Washington, then, is it the law, do they construe the law, that if the husband executes a note, unless something to the contrary is in the contract, it is presumed that it is a charge against the community property?

Miss CARLOSS. Yes, sir.

Mr. HILL. That is a rebuttable presumption?

Miss CARLOSS. Yes; that is a rebuttable presumption; it is prima facie.

Mr. HILL. It simply means that the burden of proof is on the community to show that it is not for the benefit of the community?

Miss CARLOSS. Yes; exactly.

Now, in Louisiana where I said the wife had greater rights, as far as restricting the husband's management, than any other State, we have this rule: that a wife, if she finds that her husband is mismanaging the community property, may bring a suit for separation of property without securing a divorce, and may have the court make a division of the community property and give her her share. That is the only State in which that applies. In the other States, if the husband mismanages the community property, the wife's only redress is in connection with a divorce.

Mr. FREAR. But without a proceeding by the wife, the husband retains control as in the other cases?

Miss CARLOSS. Yes, sir.

Mr. COCHRAN. In Louisiana, where there has been a separation of the property between a husband and wife, what is the status of the income after that?

Miss CARLOSS. It will be separate property of the particular half, attributable to the particular half.

Mr. COCHRAN. As regards wages or salaries——

Miss CARLOSS. The wife's own wages or salaries?

Mr. COCHRAN. Yes.

Miss CARLOSS. While living apart from her husband, in Louisiana, they are her own property.

Mr. COCHRAN. Suppose there is a separation of property between the husband and wife, but the husband and wife are living together. What is the status of the salaries or wages of the husband or wife?

Miss CARLOSS. I see what you mean, sir. The separation of property puts an end to the community. Thereafter they are just like any other husband and wife in any other State, as I understand it.

Mr. SHALLENBERGER. Can they enter into a contract to separate their property and thereby set aside this general principle of law which we are considering?

Miss CARLOSS. In the State of Louisiana they may not do so. There they may enter into an antenuptial contract to settle the property rights any way they see fit. But if they do not do anything before they are married the community exists by operation of law afterwards.

In California it is probable that they can by agreement change the character of their property from one thing to another; although, if I may refer to this for the protection of the Department, the Department is contending that insofar as an agreement of that sort relates to salaries, it is ineffective to change the character of the income from one status to another; that it is taxable according to the status it would have under the law if there had been no agreement. That question is up before several courts now.

Mr. HILL. Is it not true that in some of the community-property States the husband may by proper conveyance convey to his wife his interest in the community estate; and likewise, the wife may by proper conveyance transfer her interest to the husband in the community estate?

Miss CARLOSS. I believe that to be true, but I do not believe I can say which ones it would be true in. I do not believe it is true in Louisiana, because I do not think they can do anything there to change the character of it.

I referred in connection with those restrictions, I believe, to Louisiana, Texas, Arizona, and Washington. I do not believe I said anything about California. In California the only restriction, apparently, is that he cannot give it away without his wife's consent; and also that he cannot sell real estate without his wife's consent. That is true in California, also.

Mr. HILL. When you say consent, how is that consent to be expressed?

Miss CARLOSS. In the conveyance.

Mr. HILL. Of real property and also personal property?

Miss CARLOSS. No, sir; it is not required as to personal property.

Mr. HILL. But as to real property in California, as well as in Washington and Arizona—and what other State?

Miss CARLOSS. That is all.

Mr. HILL. The wife must join in the deed of conveyance?

Miss CARLOSS. Yes, sir. And in addition, in California we have the rule that the husband cannot give away the property, community property, without his wife's consent.

In connection with California I would like to refer to the Robbins decision which, of course, was rendered before certain changes were made in the California law, having to do with the ownership of the property.

In the *Robbins case* the Supreme Court said that the husband might waste the community property in debauchery and the wife would have no redress. Of course, that statement was made as to the law before it gave the wife a vested half interest. I do not know whether they would say the same thing now or not. But that is the statement that is generally made under the old cases relating to community property.

For instance, in *Garrozi* v. *Dastras* (204 U.S. 64), it points out that it was one of the fundamental elements of the community property that the husband have complete management and control and the changes that have been wrought in that policy have been wrought by statute. They do not exist in the fundamental law itself.

Mr. FREAR. You do not know whether there has been any change in the law since that case?

Miss CARLOSS. Since?

Mr. FREAR. I mean as affecting the husband's control.

Miss CARLOSS. What I have said, sir, is based on the law as it existed in 1930, when these community-property cases were decided. I do not believe there has been any substantial changes so far as control and managements in those States are concerned since then.

Mr. FREAR. Not by statute.

Miss CARLOSS. No, sir.

Mr. HILL. Do you mean that in California the husband could dissipate the community property, the community estate, without the consent of the wife, waste it in debauchery, as you say was held in the Robbins case?

Miss CARLOSS. I think so, sir, except that, of course, he might be held to account at the time of a divorce or after the death of the husband when there was a settlement of the estate; with this

exception, that I do not think he could give away the community property. But I think he could waste it.

Louisiana is the only State, really, which holds him to account for what he does so long as a community exists, and even there the very act of holding him to account by bringing this action for separation of the property, brings an end to the community, but not to the marriage.

Mr. FREAR. Recent proceedings have indicated that the women of Louisiana have a very important part not only in the matter of property, but other matters.

Miss CARLOSS. That is about all I had in mind to say, unless the committee wants to ask me any questions.

Mr. HILL. You are not discussing, then, the constitutional question before the committee at this time?

Miss CARLOSS. No, sir. If you want more discussion on that from the Department, I suggest you should recall Mr. Monarch, because he has gone into that feature of it, and I have not.

Mr. HILL. Are you appearing here for the Department of Justice as sponsoring this legislation, or simply to give information relative to the matters which you have discussed?

Miss CARLOSS. More to give information. We understood that you were asking for an expression of opinion as to the constitutionality of this proposed legislation. Mr. Monarch did that on yesterday, but we thought that our views would be clarified if we pointed out today what some of the incidents of the community-property system were.

Mr. HILL. It is not your purpose, then, in appearing, or it is not the purpose of the Department of Justice in appearing in this case to express an opinion as to the policies Congress should adopt relative to taxation of community-property income?

Miss CARLOSS. I would rather you ask Mr. Monarch that question, because he is better informed than I. I am not really authorized to speak on that.

Mr. FREAR. His testimony yesterday was sufficiently clear to indicate his own views. I was going to ask this. Will you place in the record the cases—I believe you said there were five——

Miss CARLOSS. Yes.

Mr. FREAR. Will you please place those cases in the record and anything that especially should be considered by the committee, in your opinion, both that which you have discussed and anything else that may occur to you, because I believe that it will be helpful to those of us who have not had an opportunity to study these cases.

Miss CARLOSS. I will insert in the record a list of the cases to which reference might be made.

(The list referred to is as follows:)

U.S. v. *Malcolm* (282 U.S. 792), *Poe* v. *Seaborn* (282 U.S. 101), *Goodell* v. *Koch* (282 U.S. 118), *Hopkins* v. *Bacon* (282 U.S. 122), *Bender* v. *Pfaff* (282 U.S. 127). Also *United States* v. *Robbins* 269 U.S. 335), *Garrazi* v. *Dastas*, (204 U.S. 64), Pennington's Compiled Statutes of Washington, 1922, sections 6892 and 6893; *DePhillips* v. *Neslin* (139 Wash. 51), *Corliss* v. *Bowers* (281 U.S. 376).

May I ask if the committee would care anything about having the briefs of the Government in those community-property cases?

Mr. FREAR. Are they very long?

Miss CARLOSS. I am afraid they are, sir. They contain all the statutes relating to community property and some discussion of these matters that I have talked about today. I do not know how many copies we would be able to provide, because there has been quite a demand for them, but I think we could submit one of each.

Mr. HILL. I think the committee would better take that under consideration.

Mr. SHALLENBERGER. I should like to ask one more question. In this bill the term management and control seems to be the determining factor. Has that term been legally defined? Is there a definition of it by a decision of the court, or is that a new term?

Miss CARLOSS. It is a term that was used in that provision because so many of the decisions of court in these community-property cases or the statutes themselves refer to the husband as having management and control.

Mr. SHALLENBERGER. So that is a legally defined term?

Miss CARLOSS. Yes.

Mr. FREAR. It was suggested yesterday by the gentleman who appeared from your Department that the word "enjoyment" be inserted as an amendment after the words "management and control." Has there been any definition of that by the courts, so far as you know?

Miss CARLOSS. The courts in tax questions generally have considered that term. For instance, I believe in the case of *Corliss* v. *Bowers* (281 U.S. 376), a case of a revocable trust, the court held that Congress could tax the income of a trust to the grantor; the fact that the grantor had it within his power to revoke the trust and "resecure the enjoyment"—was emphasized. The term has also been used by the Supreme Court very often in dealing with the estate tax questions, as to whether there has been a transfer at the time of death or not; that is, whether the testator had unil the time of his death retained substantial powers of enjoyment as well as control over the property.

I do not know that I can say that there is any hard and fast definition of enjoyment. It is a term that has been frequently considered.

Mr. FREAR. And used by the court?

Miss CARLOSS. And used by the court.

Mr. HILL. In the case of revocable trusts, or in the case of gifts with a string to it, the owner of the property, that is, the party who created the revocable trust, or the party who made the gift, was the owner of the property involved, was he not?

Miss CARLOSS. Yes.

Mr. HILL. And so it is management and control of his own property; that is, management and control of property which he has conditionally given away to some other person?

Miss CARLOSS. That is true.

Mr. HILL. Retaining certain control and enjoyment of the property?

Miss CARLOSS. Of course, he has not retained the title; that has gone.

Mr. HILL. But the property originally was the property of the party creating the trust in the case of the trust income and of the party making the gift in the case of the donation?

Miss CARLOSS. Yes.

Mr. HILL. Now, in the case of an irrevocable trust, the trustee has the management and control, does he not?

Miss CARLOSS. Yes.

Mr. HILL. And has the legal title; but management and control in that case does not impose upon him the burden of the payment of the tax on the income from the trust property?

Miss CARLOSS. Yes, sir; it does in some cases. There is a different classification of trusts under the income-tax law, where the trust is one for future accumulation, the trustee is taxed on the income.

Mr. HILL. But the trustee is not taxed in his individual capacity?

Miss CARLOSS. No, sir; in his representative capacity.

Mr. HILL. And the payment of the tax comes out of the trust fund?

Miss CARLOSS. Yes, sir.

Mr. HILL. So that it does not relate back to him as a personal obligation?

Miss CARLOSS. No, sir.

Mr. SHALLENBERGER. I would like to ask one other question, because we have a very informing witness before us this morning.

In this matter of determining the proper way to levy the income tax in these States that you have referred to, as I gather from your remarks, the community income is determined in the different States in a somewhat different manner. It is not determined in each State in exactly the same way.

Miss CARLOSS. That is true, sir.

Mr. SHALLENBERGER. But after the community income has been determined in any State, then the question of how that income shall be returned for taxation is a matter that is involved in this bill largely?

Miss CARLOSS. Yes, sir.

Mr. SHALLENBERGER. You do not attempt to enter into the other matter, but just that one proposition?

Miss CARLOSS. We do not attempt to say what is community income in the States.

Mr. SHALLENBERGER. And in the State of Washington, represented here by our distinguished colleague, it would be one method and in California perhaps another.

Mr. HILL. I would like to ask this question. The bill before the committee now bases the right of taxing income of the community property to the spouse having the management and control upon the fact of management and control and not of ownership?

Miss CARLOSS. Yes.

Mr. HILL. You understand that in all these community-property States, the ownership of the property income as well as the ownership of the community property is vested one half in the wife and one half in the husband?

Miss CARLOSS. Yes, sir; that is true.

Mr. HILL. And the husband, in exercising his power of management and control under the statutes and constitutions of the community-property States, is acting, insofar as his wife's vested interest in the community income and the community-property estate is concerned, in a representative capacity?

Miss CARLOSS. I should say yes, sir, with this qualification. The ordinary agent can be held to account. In the community-property States other than Louisiana it is very difficult for the wife to hold the husband to account except by securing a divorce.

Mr. HILL. But the husband who is given management and control of the community estate has no vested right to that power of management and control.

Miss CARLOSS. No, sir. The State legislature could change that.

Mr. HILL. They can designate any other person to manage if they desire to do so?

Miss CARLOSS. Yes, sir.

Mr. SHALLENBERGER. If there are no other questions, we thank you very much, Miss Carloss.

The next witness is the Honorable Hatton W. Sumners, of Texas.

STATEMENT OF HON. HATTON W. SUMNERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. SUMNERS. Gentlemen of the committee, I am going to try to be as helpful to the committee as I can in the consideration of this matter. I happen to come, as you know, from the State of Texas. I have some familiarity with the statute law and the construction placed upon it by the Supreme Court of that State and the Supreme Court of the United States. And I know a little something of the history of our community-property laws.

In the beginning, I would like to direct the attention of the committee to what I believe is the source of a good deal of confusion, some of it manifest, I think, in the discussion before your committee and by the gentlemen who represent various agencies of the Government.

Our community-property law runs back through the Republic of Texas, Mexico, Spain, and probably loses itself, insofar as our interest is concerned, in the German forests.

Mr. Chief Justice White, of the Supreme Court of the United States, rendered an opinion in a case in 176 United States. By the way, Mr. Justice White was not only a great judge, but he was an expert witness, because he came from the State of Louisiana, where this law obtains. He clearly understood what this law is, and the rights of the spouses under the law and under their constitutions, whether they were written constitutions or not. They were part of the constitutions of those States.

Mr. FREAR. You refer now to Louisiana?

Mr. SUMNERS. That is correct.

Mr. FREAR. Of course, he was from Louisiana.

Mr. SUMNERS. He was from Louisiana; yes, sir. But the base of the policy of each of these States is the same. The confusion I think with regard to the decisions that have been rendered and have been referred to grows out of this fact that the decisions with regard to the constitutionality of these laws rest upon a situation where the property rights were vested in the wife and in the husband—belonged to them. All the decisions with reference to the creation of trusts have to do with the alienation of property, the separation of the owner from his title. And as I shall undertake to show—and I will be as brief as I can—the decisions with regard to the creation

of a trust turn upon whether or not the owner of the property had completely separated himself from that property. He created a trust but held a string on it. He created a trust in order to protect his dependents whom, in nature, he would have every reason to protect. The courts held in those cases that there was not such a separation from the title and the interest of the creator of those trusts as to prevent the operation of the Federal law seeking to tax that part of the income represented by the insurance policies that had been paid.

But there is not a decision by the Supreme Court anywhere that has failed to hold—except in the first California case that was modified, as far as I know—that under the community arrangement the wife owns one half of the property. It is hers. The Supreme Court a number of times has examined the effect of management and control by the husband, and the Supreme Court in the clearest sort of way has held that that did not disturb the question of absolute ownership of the wife of that one half of the property.

The first case to which I want to direct the attention of the committee is the opinion by Mr. Chief Justice White, reported in 476 United States. The name of the case is Warburton versus White. With the indulgence of the committee, I shall read at page 490.

Mr. FREAR. In what State did that case arise?

Mr. SUMNERS. This is, I believe, an opinion from a case arising in the State of Washington. The question arose with reference to property in Washington and had to do, without going into great detail, with what happened in connection with the transfer of certain real estate. It is not necessary to go into a statement of facts, because no part of what I am to read would be claimed by anybody to have been obiter. It was a statement necessary in order properly to decide the case.

The court said:

> By virtue of the statute—

That is the statute of the State of Washington.

> By virtue of the statute this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way.

I want especially to direct the attention of the committee to this declaration by a great judge who came from a State where this system obtains.

> In somebody must be vested a power in behalf of the community to deal with and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute.

That states the general layout in those States.

> Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community.

I would like to find out how English language can be used to state a proposition more clearly than that. I repeat—

> But is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband and lay it upon the husband and wife together. As the husband's "like absolute power of disposition as of his own separate estate," bestowed by the ninth section of the act of 1873, was a mere power conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife conjointly. This was done.

At page 492 the Supreme Court says:

> The legislature could as well have provided that the wife could convey as the husband; * * *

Mr. SHALLENBERGER. I was interested in that question once before. Is it the construction in those States that the husband can, but that his wife cannot do that?

Mr. SUMNERS. I think in all the community-property States—and these gentlemen who are more familiar with the details of the legislation in those States can answer more certainly and accurately than I can answer; but I will say that whatever the exceptions are the general plan is that the husband is made manager of the estate. As a matter of public policy, as announced by Mr. Justice White in this opinion, and as has been indicated in subsequent opinions, it has been determined by the legislature that there has got to be somebody to manage the property and be responsible in transactions with the public with regard to the property; and the legislatures have seen fit in most of these States to vest that responsibility and power in the husband. Mr. Chief Justice White said:

> The legislature could as well have provided that the wife could convey, as the husband; * * *

That means if they had provided that the wife could convey as well as the husband exclusively, that would not thereby disturb any of the property rights of the husband.

At page 497 the Court says:

> It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involves no negation of the community, since the common ownership would attach to the result of the sale of the property. * * *

I say without any hesitancy to the committee, if I may do so with all due respect, that the general principle laid down by the court in that case and the general determination of what happens insofar as the property is concerned, the title is concerned, the ownership is concerned, has never been disturbed.

There is not a single decision that can be found anywhere in the books; but, on the contrary, all the opinions of the courts—and there have been many decisions here; there were three decided in one volume in which the equal ownership of the wife in the community property has been established.

May I turn aside for just a moment to clear up, if I can, some confusion resulting from some statements unintentionally made as to what was involved in this transaction?

As I remember, probably in response to a question by the committee, one of the witnesses stated that there was between 40 and 60 million dollars involved, or that much money depended upon the

enactment of the Treadway bill. I would like to call the attention of the committee to this fact——

Mr. FREAR. I undersand that that figure has been modified.

Mr. SUMNERS. Has that been straightened out?

Mr. FREAR. I have not seen the correct figure.

Mr. HILL. It has not been straightened out in the record, Mr. Frear.

Mr. SUMNERS. I would like to put that in the record, if I may. This figure of $40,000,000 was incorporated in a statement that came down to the committee from the Treasury Department. That estimate was based upon the suggestion of the Treasury Department that all these estates held by husband or wife, whether separately or jointly all over the country, should be treated as an entity for taxation purposes. You gentlemen know better than I, but I understand that was a suggestion that came down to you from the Treasury Department.

Mr. HILL. You are speaking now of the estimate submitted by the Treasury Department on this matter?

Mr. SUMNERS. Yes. That is what I am speaking about. If there is any doubt about it, the statement itself makes it clear. Shall I put it in the record?

Mr. SHALLENBERGER. You may. Please tell us what you are reading from.

Mr. SUMNERS. I am reading from the volume entitled. "Revenue Revision, 1934—Hearings Before the Committee on Ways and Means, House of Representatives, Seventy-third Congress, second session."

I am reading beginning at page 112. The statement is as follows:

> Under the present law, a husband and wife living together may, at their own option, make separate returns or may make a single joint return.

That is with reference to the general situation.

Mr. SHALLENBERGER. That statement is made by whom?

Mr. SUMNERS. By a representative of the Treasury Department. I do not want to take up too much of the time of the committee with this statement, and I am simply wondering how much of the statement I shall read in order to make the point clear.

Continuing with the statement:

> If each has an income of any considerable size, each will ordinarily make a separate return in order to reduce the normal tax, and, more particularly, the surtaxes which would otherwise be payable. The family income is in fact frequently expended and otherwise treated as a unit; nevertheless, if the husband and wife can so arrange their affairs that the wife is in receipt of a portion of the family income, income taxes can be considerably reduced. In other words, the present privilege of filing separate returns operates to that extent to defeat the progressive rate schedule, particularly in the case of the larger taxpayers.
>
> It is evident that this situation is the direct cause of numerous transfers, sales, assignments, and other arrangements between husbands and wives which have no real basis and are made because of a desire to avoid income taxes otherwise due.

It is perfectly clear that that does not refer to the community property States, because it would not be operative in those with regard to which I am familiar.

Continuing with this statement:

> For example, property which has appreciated in value is transferred to the spouse who can sell it with the least tax liability. Again, property which has depreciated in value is transferred to the spouse with the larger income, in order that he may realize the greatest benefit from sale at a loss. Moreover, the present law encourages sales by one spouse directly to the other, and the courts are presented with the difficult and even impossible problem of determining whether such sales were bona fide or fraudulent. In the most notorious recent case, the jury acquitted the husband from a criminal charge in such a situation. The income taxes, which the husband sought to avoid in this manner, amounted to over $1,000,000.

I suppose it is a matter of common knowledge that that was not in a community-property State.

Mr. HILL. It is a matter of knowledge to the committee that that was the Mitchell case.

Mr. SUMNERS. Yes; that is what it was. The committee is well informed.

Mr. HILL. That was in New York.

Mr. SUMNERS. After making further recitations, the Treasury Department has this to say:

> The Treasury Department, therefore, recommends that the committee consider whether a husband and wife living together should not be required to file a single joint return, each to pay the tax attributable to his share of the income. Such a provision has long been in force in other countries.

I do not believe it is necessary for me to read further. I merely wanted to establish clearly that fact.

Mr. HILL. I understand you are now making the point that the statement made by the representative of the Treasury Department that you have just read, had reference not to community-property States alone but to all the States of the Union?

Mr. SUMNERS. Yes; and was in support of the bill or the suggested amendment—whichever it was—sent down by the Treasury Department indicating its judgment that if there is to be any legislation concerning it—I am referring to the original suggestion—that all husbands and wives living together, wherever they live together in the 48 States, should render one income-tax return.

Mr. COCHRAN. Mr. Chairman, I should like to ask Mr. Sumners what would be his reaction to that proposal of the Treasury, as Mr. Sumners comes from a community-property State.

Mr. SUMNERS. Mr. Chairman, I have not given the matter consideration as you gentlemen of the committee have, but my reaction, speaking on my feet, is that if the committee is to modify the existing law with regard to the rendition of property for taxation. property of husbands and wives for taxation, what they do ought to be comprehensive; it ought to be all-inclusive. This proposed amendment submitted by the gentleman from Massachusetts, Mr. Treadway, would be a most definite injustice to the community-property States, as compared with those States where separate renditions may be had and where advantages may be had by the spouse not permissible under the laws and the constitution of my own State, for instance.

Now, Mr. Chairman, if there should be any doubt as to the correctness of my suggestion that the estimate of 40 to 60 million dollars had reference to the savings that would be had or the advantages which would be derived under the suggestion from the Treasury Department as distinguished from what would result under the Treadway bill, I desire to call to the attention of the committee the fact that the total taxes paid by all individuals in 1931 in those States was $22,256,282.

Mr. HILL. What year was that?
Mr. SUMNERS. 1931, the figures as they are available.
Mr. COCHRAN. Let us get that correct.
Mr. SUMNERS. I do not know whether it is correct or not.
Mr. COCHRAN. The total taxes in the eight community-property States paid by individuals in 1931 amounted to $22,000,000?
Mr. SUMNERS. $22,256,282.
Mr. SHALLENBERGER. That is the total of the income taxes, not the total of all taxes?
Mr. SUMNERS. That is correct.
Mr. SHALLENBERGER. Paid by individuals?
Mr. SUMNERS. Yes.
Mr. HILL. That included unmarried as well as married persons?
Mr. SUMNERS. All individuals.
Mr. FAUNTLEROY. That is about one tenth or one eleventh of the whole amount paid in the entire United States, which was about $240,000,000 from individual income taxes of every kind, sort, and character.
Mr. HILL. It includes the returns of all individuals, both married and unmarried?
Mr. FAUNTLEROY. That is correct; all individual income taxes collected.
Mr. FREAR. What would have been the effect if in the community-property States the husband in that case had rendered the account placing the income in the higher brackets? Would that have changed the amount?
Mr. SUMNERS. If any of these gentlemen with me can answer the question, I am glad to yield. It probably would have made some difference, but just how much, I do not know.
Mr. HILL. Can Mr. Fauntleroy give us that information?
Mr. FAUNTLEROY. I can give you the approximate figures. In 1921, Mr. McCoy, the actuary of the Treasury, speaking of seven community-property States, exclusive of California, in reply to a letter written by Senator Ransdel to the Commissioner of Internal Revenue, was quoted by the Commissioner of Internal Revenue as saying that the total income saving by reason of the division into two returns was approximately $5,000,000.
I have asked the Treasury Department representatives here to submit the information concerning which it is my recollection that Secretary Mellon in the 1924 Revenue Act, when it was pending, estimated a figure I think of $7,500,000 as the amount of additional taxes that would be collected if the community property were taxed on a basis similar to the proposal now being made.
Mr. FREAR. Was the tax rate the same as it is now?
Mr. FAUNTLEROY. It was not the same, but in 1921 I think you will find there was not a substantial difference. It would be my guess that since California has come into it, and the Treasury Department with all of its data—and it has data on this question—submits a total amount of community income reported for the year 1931 of something like two hundred-odd-million dollars——
Mr. FREAR. May I ask a question of the gentleman myself?
Mr. SUMNERS. I wish you would. Mr. Chairman, may I make this statement? I have had a good deal to do with committee hearings, and I think that giving information is far better than trying to

make a speech. If I can state the experience and make the example and save you a lot of oratory from these gentlemen, I think I will have done a good service for the committee and should stand in the favor of the committee.
Mr. FREAR. The gentleman always does. Now, I should like to ask one question in relation to something to which you have referred. You said that the question of the property right in the marital community had been settled by the Supreme Court decisions.
Mr. SUMNERS. Yes.
Mr. FREAR. I understand you to make that statement.
Mr. SUMNERS. I make that statement.
Mr. FREAR. Have you any decisions of the Supreme Court in regard to what is termed in this bill the income-tax liability of any individual during any taxable year? How does this bill propose to change the income-tax liability of the individual? Are there any decisions upon that question?
Mr. SUMNERS. We believe we have them; yes, sir. We believe we have what amounts to a direct decision and then we think that the total of the pronouncements of the Supreme Court on the subject clearly settle that question. Of course, this bill has never been construed, but we feel that it has been construed all around and falls under the condemnation of the Supreme Court construction.
Mr. FREAR. Let me suggest this. Some of us represent States that are not community-property States, while others represent States that are community-property States. Of course, everyone has the right—and it is proper that he should—to present his side of the case as strongly as he can. We accept that in the proper spirit, I am sure. But here is a case that I want to bring to your attention. I do not know whether there is any question concerning the accuracy of these figures which were furnished by Mr. Treadway for his statement in the record. The statement says, for instance, that a man with a $10,000 income in a community State pays a $300 tax while in other States with that income he would pay $480. That is due to surtaxes.
With an income of $20,000 the difference is $520.
With an income of $50,000, the difference is $3,000.
In other words, there is a difference of 39 percent between the taxes of the two classes of States. With an income of $100,000, the difference is 42 percent, a difference of $12,000.
Here is the thought that I had in mind, irrespective of whether these figures are exactly accurate. I assume, having been placed in the record, that they have some degree of accuracy.
We are placed in this position that the taxpayer in the non-community-property States, if what these figures say is true, pays a far larger amount into the Federal Treasury than the taxpayer in the community-property States. There is only one way that that can be reached, seemingly, if there is no change in the law covering income tax as proposed in this bill, and that would be to have all the remaining States adopt the community-property idea. Then, of course, when the income is lessened by reason of all of the States coming in, the Government will have to raise the rates in order to get the same amount of income. That seems to be the situation. I do not know what the difference is exactly. I presume the witness is right as to the errors that have been made in the amount involved.

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I do not think that is of as much importance as the effect on the individual. It seems to me that is a very strong argument, no matter what State we represent, that we ought to all be on an equitable footing.

Mr. SUMNERS. Yes. I appreciate very much the candor of the gentleman whose disposition and determination to be fair in this matter I do not think anyone questions.

As to the details of administration, I think it would be better for the committee to secure that information from some of the gentlemen who will follow me.

Mr. HILL. If I may interrupt the gentleman, the question arose as to the amount of revenue lost to the Government by reason of the peculiar position of the community-property States in the matter of tax returns. Would the gentleman yield for a moment to Mr. Parker to make a statement in correction of his testimony the other day on that point?

Mr. SUMNERS. I shall be glad to.

STATEMENT OF LOVELL H. PARKER, CHIEF OF STAFF, JOINT COMMITTEE ON INTERNAL REVENUE TAXATION

Mr. PARKER. I find that on the day before yesterday, when I appeared without preparation, I quoted from recollection to the effect that this bill would produce somewhere between 30 and 50 million dollars of additional revenue, according to the profits in the various States in the different years. I find on referring to my figures that I made an erroneous statement. I should have said this: That the total loss from the community-property situation, both as to the gift tax, estate tax, and the income tax, might amount to that. Of course, this bill only has reference to the income tax, and that is probably the only matter that there is any possibility of reaching.

I made a check on the estimates, and my revised figures would show that the gain to be expected from this bill, dealing simply with the income tax, would vary somewhere between $18,000,000 and $28,000,000 annually.

I do not want to contradict any of the testimony given here today, but I made a search of the records, and I find difficulty in finding the original figures.

In 1921 I found a reference in the hearings, stating that the estimate of the Treasury at that time was $9,000,000. If $9,000,000 was the correct figure in 1921, not including California, it would appear to approximately check with an $18,000,000 figure today, because California and Texas have certainly expanded very much in relation to volume of business in the last 13 years.

Mr. HILL. I want to ask on what year you base your corrected estimate?

Mr. PARKER. I took a number of years. I examined especially the year 1924. For instance, I found in the year 1924 that the eight community-property States had 12 percent of the total net income of all individual taxpayers and that they paid 8 percent of the total tax. If they had paid 12 percent of the total tax, the taxes of the community-property States would have been increased some 50 percent. I think in 1924 they paid around $48,000,000. A 50-percent increase would be $24,000,000.

I found, even in a year like 1929, that the community-property States received approximately eleven and a fraction percent of the total net income and paid about 7 percent of the total tax.

On the very large incomes of 1929, this indicated a loss of tax in the community-property States considerably in excess of $30,000,000. I also made estimates by reference to the different brackets of net income by various methods.

I should think that the 18 million to 28 million is fair. It might be a little bit high if we had another year like 1932 that was so abnormal.

Mr. FREAR. I want to ask this, and while I dislike to take Mr. Sumners' time, I am sure he will not object.

I quoted the figures from Mr. Treadway which seem to me the most pertinent figures in here, if they are accurate. Have you examined his figures that have gone in the hearings?

Mr. PARKER. I did not examine them specifically, but I do not doubt they are accurate. I put a memorandum in the record at the conclusion of my testimony that has similar figures and shows similar results.

Mr. FREAR. I want to ask if this difference exists between community States and noncommunity States in taxation, that in the community States they pay $300 taxes on a $10,000 income, whereas in the noncommunity States they pay $480, or 37.5 percent increase in the noncommunity States. That is a question I am trying to get at, of the equality and fairness of the situation.

Take the income of $20,000; there is a difference of $520, with a 30.9 percent increase in the noncommunity State over the community State.

Take the $50,000 income; quoting from Mr. Treadway's figures in the hearing, there is a difference of $3,300 increase paid by the noncommunity States, or 39.1 percent higher.

Take the $100,000 income; it is 42 percent higher.

Now, I am asking if that situation actually exists.

Mr. PARKER. Yes; that condition exists. I could not make the positive statement those figures are correct, but the situation does exist.

Mr. FREAR. The question before me is how we can bring all of the States to equality in the tax rate, or bring the community States up to what they are paying in the other States, by law, or by a Supreme Court decision, if that is the right way to reach it.

Mr. SUMNERS. May I at this point make this statement? I think it is a great deal more helpful to the committee to try to find out facts and to be just as informal as it wants to be. You hear speeches until you are sick and tired of them and you want information. I have not got much information, and I do not know whether the other folks have much or not, but what we have we are glad to give to you.

Mr. EVANS. I want to make this clear, so far as it applies to California. Mr. Parker has just stated that since California has come into this category of community-property States the total income would be augmented accordingly from those States. I just want to make this observation here, which clarifies that situation, by stating that in California the rule of separate incomes applies only

to that property accumulated or acquired by the community since 1927. That is when the California community property law was finally adjusted so as to entitle California to file separate returns.

I know as a taxpayer in California that comparatively little of the community-property holdings in California have been acquired since 1927. There has been very little turn-over in property or accumulation of property in California or elsewhere since 1927, so this matter is almost nil as applied to California, because we have to pay on everything in California prior to 1927.

Mr. FREAR. Then you disagree with these figures?

Mr. EVANS. I do, as applied to California. The net income would be the same. As a taxpayer in California I have to file a single return on all of my community property acquired prior to 1927, and I have not acquired a dollar since. That is the way it applies.

Mr. PARKER. That is true; but I might call your attention to the fact that many taxpayers in California filed community returns as late as 1926. As has been pointed out, the Robbins case, holding that the wife had a mere expectancy in the community income, was not decided until 1927. On March 8, 1924, the Treasury issued a ruling, pursuant to an opinion of the Attorney General, to the effect that spouses in California were entitled to file community-property returns. While this opinion was later reversed and a new ruling issued on May 31, 1924, there was still enough doubt about the situation to cause many taxpayers to file their returns on a community-property basis as late as 1926. Prior to the enactment of the gift-tax law, there was a considerable splitting up of property between man and wife in a non-community-property State. However, a spouse could not escape surtax in those States by assigning any part of his salary to his wife, because such assignments were not recognized for tax purposes under the decision of the Supreme Court in the Earl case. Moreover, the gift tax discouraged gifts between husband and wife in noncommunity States to a large extent.

Mr. HILL. That is beyond $50,000.

Mr. PARKER. Yes; on the large incomes.

Mr. FREAR. These figures show that on the $100,000 income in non-community-property States they pay 42 percent higher than the community-property States, and you say California is excepted, Mr. Evans?

Mr. EVANS. I do not know whether you follow me or not.

Mr. FREAR. You are speaking of a certain kind of taxes?

Mr. EVANS. I am trying to impress the committee with this fact, which the Supreme Court has held in a number of cases, that on property acquired in California prior to 1927 the husband must file a joint return. On any income from property I acquired prior to 1927 I must file a joint return for myself and wife, and I say again there is very little property of this kind accumulated since 1927, except salaries as Mr. Parker mentioned.

Mr. SHALLENBERGER. The Chair would like to say here we have had quite a friendly discussion for the last few moments and it has been informative, but if I followed the questions first my friend Frear raised the difference as to the taxes levied in community States and noncommunity States, and it seems to be the general admission these figures are true here.

Mr. PARKER. They are absolutely true as to salaries, but when you get into other types of community property it is a different thing, and you may have different situations in different States.

Congressman Evans, I think, made a slight error. He said the spouses were forced to file a joint return. Of course a joint return is not mandatory, it is optional; but I believe in California the husband must include in his return all of the income from property acquired before 1927.

Mr. EVANS. That is my statement. May I state, as a personal experience, for the year 1931 my wife and I filed a separate return and divided the income on income property we had acquired prior to 1927, and this last year the field department came around and required me to pay a tax on the total amount, which was an additional tax.

Mr. PARKER. That is correct, only it is not technically called a joint return.

Mr. Evans. That is a distinction without a difference, and we are talking about what the taxpayer pays.

Mr. HILL. Let me ask a question. The tax on salaries is not calculated separate and apart from other income?

Mr. PARKER. No; it is on the one return.

Mr. HILL. For instance, take the illustration Mr. Frear had of $10,000, the husband acquires the $5,000 and the wife $5,000, and the wife may have $50,000 separate income in addition to the community interest. That would be added to her $5,000, and get in the higher brackets. While the figure of $50,000 is used and not as a typical illustration, it is no uncommon thing. But in fact it is the usual thing that the wife does have separate property and the wife has separate income, and she adds this half of the salary to her income and puts it in the higher brackets.

Mr. PARKER. Of course in all cases assumptions have to be made and the assumption in the case Mr. Frear gave was that the income was all salary income and that the wife had no outside means.

Mr. SHALLENBERGER. As I gather, Mr. Parker, you are testifying in your estimate that $18,000,000 to $28,000,000 would be the utmost we could expect to receive under the present bill if enacted into a law. Is that your statement?

Mr. PARKER. That is correct, Mr. Chairman, and I was anxious to correct the erroneous statement I made on the first day. It was not made with intention, but it was through confusion.

Mr. HILL. Would you like to put this letter you sent me in the record, Mr. Parker?

Mr. PARKER. Yes; I would, Mr. Hill.

Mr. HILL. I offer this letter of Mr. Parker's for the record.

Mr. SHALLENBERGER. Without objection, it may go in the record.

(The letter is as follows:)

CONGRESS OF THE UNITED STATES,
JOINT COMMITTEE ON INTERNAL REVENUE TAXATION,
Washington, May 2, 1934.

Hon. SAM B. HILL,
House of Representatives, Washington, D.C.

MY DEAR CONGRESSMAN: In my testimony of yesterday I stated from memory that in my opinion the Government would gain from 30 to 50 million dollars in revenue from imposing the income tax on the income of the spouse having the management and control of the community property.

On referring to my computations made some months ago, I find that these figures represented the total loss of revenue estimated to result from the income tax, the estate tax, and the gift tax on account of the community-property laws of the eight States having such laws. The statement I made on yesterday, attributing all of this loss to the income-tax situation, is therefore in error.

It is now estimated by this office that if the pending bill becomes law and the community-property income is taxed to the spouse having the management and control of such income, additional revenue will accrue annually to the Government amounts varying from 18 to 28 million dollars according to the variations which may be expected in future profits. As a check on this estimate, I submit the following figures taken from the year 1924, when our surtax rates went to 40 percent and which, therefore, are somewhat comparable with our present situations:

State	Tax	Net income
California	$37,800,000	$1,741,000,000
Texas	10,235,000	638,000,000
Total	48,035,000	2,379,000,000
Massachusetts	40,857,000	1,320,000,000
Michigan	30,983,000	1,045,000,000
Total	71,840,000	2,365,000,000

It will be observed from the above figures that the total net income in the two community-property States, California and Texas, was approximately the same as the net income from the non-community-property States Massachusetts and Michigan. Nevertheless, we secured only $48,000,000 in tax from California and Texas, while we secured $71,000,000 in tax from Massachusetts and Michigan. Therefore, there is a difference in the tax yield in these two groups of States in excess of $23,000,000, which may well represent the loss due to our inability to tax the residents of California and Texas in the same manner as we tax the residents of Massachusetts and Michigan.

I respectfully request that this letter be placed in the record or that you draw attention to my inaccurate statement before the committee on yesterday.

Very truly yours,

L. H. Parker, *Chief of Staff.*

Mr. Shallenberger. Mr. Sumners, you may continue, if you desire.

Mr. Sumners. Now, that is concluded and I will try to show they made an erroneous statement in reference to this bill yesterday. In order that there may be some continuity in the development of this constitutional question, which I am justified in assuming is an important question for everybody, may I first state that my first reference was to the case by Mr. Chief Justice White in 176 U.S., and the quotations were from pages 492, and one or two other pages.

In that opinion, Mr. Chief Justice White, that the property interest of the husband and the wife were equal in community property, and the fact that the husband is given the power of control and management, which is to be found usually in these community-property States, did not at all affect the question of property rights; and that the legislature might just as well have provided that the wife should have control; and that the purpose of this arrangement was to have some agent of the community authorized to deal with other people with regard to the community property.

I want to briefly direct the attention of the committee now, if I may, to some excerpt from the opinion in *Poe* v. *Seaborn* to be found in the 282 U.S.

I appreciate the fact that these opinions have heretofore been called to the attention of the committee, and therefore I shall be just as brief as possible in the references to them. This was a Washington case also.

I think the determination of the court and the language of the Supreme Court will indicate sufficiently what was involved and avoid the necessity of having to call your attention to what was included in that case.

In referring to the statute of Washington the court says:

These statutes provide that, say for property acquired by him, bequest, devise, or inherit, all property however acquired after marriage, by either husband or wife, or by both, is community property. On the death of either spouse his or her interest is subject to testamentary disposition, and failing that, it passes to the issue of the decedent and not to the surviving spouse. While the husband has the management and control of community personal property and like power of disposition thereof as of his separate personal property, this power is subject to restrictions which are inconsistent with denial of the wife's interest as coowner.

At page 111 I quote as follows:

Without further expanding this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband.

That is an important thing in the determination of the question of constitutionality, and here is a clear-cut decision in a sentence, that, "her vested right in community property is equal to that of her husband."

It seems the pronouncement of the court of last resort, it ought to be agreed, has settled this question.

Then the sentence quoted above continues as follows:

And in the income of the community, including the salaries or wages of either husband or wife, or both. A description of the community system of Washington and of the right of spouses and of the powers of the husband as manager will be found in *Warburton* v. *White* (176 U.S.C. 484.)

In this case it was sought to draw support to those who were seeking to sustain the position of those who were defending the Treadway bill from the earlier decision in California which has so frequently been called to the attention of the committee, and I do not think it is necessary to refer to that again.

It says here:

The Corliss case raised no issue as to the intent of Congress, but as to its power. We held that where a donor retains the power at any time to revest himself with the principal of the gift, Congress may declare that he still owns the income.

Following that the court makes a very significant statement, and this statement of the court, borne in mind wants to avoid the confusion that might arise in examination of these cases that I am going to refer to later on, and which was referred to on yesterday or the day before by the proponents of this legislation. Now, in this case the court says in this situation, "Here the husband never has ownership."

That is the distinction between the cases which arise with reference to the construction of the community relationship and the power to tax the husband, and so forth, for the property income of his wife, and those cases where the husband had ownership and sought to establish the trusts that are referred to.

But here the husband never has ownership. That is in the community at the moment of acquisition, and remains in the community until its dissolution, and the community is made up of an ownership on the part of the husband and the wife that are equal, and there has never been a decision of the Supreme Court anywhere that has in the slightest way indicated any question in the mind of the Supreme Court with reference to the soundness of the conclusion arrived at in this case of *Poe* v. *Seaborn*.

Referring to the California case, that case presents quite a different question from this case here. By law the earnings are never the property of the husband, but that of the community. That was the California case, where the husband and wife had entered into an agreement under which his salary and her salary and their earnings were to go into a common estate and be equally divided.

Mr. COCHRAN. The cases you cite are upon the imposition of tax upon the ownership of the property. Mr. Monert yesterday gave it as his opinion that Congress could pass a law levying the tax on the management and control. What have you to say as to the constitutionality of such a law.

Mr. SUMNERS. You mean to say now, that you can tax one man with reference to the income from another's property, by reason of the fact he has the management and control of the other's property.

Mr. COCHRAN. I am just stating what he said.

Mr. SUMNERS. I can only state, that to state the proposition, shows its fallacy, and I say that with due respect to the gentleman.

Mr. HILL. Will the gentleman from Texas yield, to let me read a case on that point?

Mr. SUMNERS. Where is it?

Mr. HILL. It is the Hoeper case from Wisconsin, and it is an ideal answer to this proposition.

Mr. SUMNERS. If you will permit, I would like to go ahead with this matter, and I will reach that point later. I am not overlooking that case but I want to take it up in order when I get to it.

Mr. HILL. I just wanted to put it in as an answer to the question asked.

Mr. SUMNERS. I will reach that case later and will take it up then. I want to read this further excerpt from the Seaborn case as follows:

> When it is remembered that a wife's earnings are a part of the community property equally with her husband's, it may well seem to those who live in States where a wife's earnings are her own, that it would not tend to promote uniformity to tax the husband on her earnings as part of his income.

Now, the court answered that in this manner:

> The answer to such argument, however, is that the constitutional requirement of uniformity is not intrinsic, but geographic.

I want to make this brief reference to the case of *Goodell* v. *Koch* from the Supreme Court of Arizona:

> The law makes no distinction (quoting with approval the opinion by the Supreme Court of Arizona) between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. As in Washington, each spouse has unlimited testamentary power over his or her interest in the community, and upon failure to exercise it, such interest passes to the defendants of the decedent.

In this case the court held that the ownership was equal.

Mr. Justice Roberts in the case of *Hopkins* v. *Bacon* reported in the same volume, reading from page 126, a very brief excerpt, said:

> They provide, as is usual in States having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it was his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property. * * *
>
> In view of what has been said in *Poe* v. *Seaborn*, supra, it remains only to say that the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband, and that one half of the community income is therefore the income of the wife. She and her husband are entitled to make separate returns, each of one half of such income

That answers the question of the gentleman from Pennsylvania.

Now, there is a court determining that the husband and the wife each owns a half interest in the community and holding unconstitutional a Federal law seeking to have the husband make a single return, basing the conclusion as to unconstitutionality upon the fact that the property with regard to which the husband making the return did not belong to him.

Mr. COCHRAN. That is under the law which bases the tax on ownership, and the question raised by Mr. Monert yesterday was that a law basing the tax on the management and control would be constitutional.

Mr. SUMNERS. I know, I heard him. That is pretty difficult to argue. I don't know how I would go about arguing a statement made by a gentleman that merely because somebody controls the property of somebody else you can tax him on the income. I would have a hard time clearing up any argument on that sort of a question. I never heard of it.

I do not see on what theory you can go out here and tax somebody on the earnings of somebody else. And if there is anything more certainly determined by the courts of last resort, it is that this property belongs to the wife.

Mr. COCHRAN. Having in mind particularly a lawyer earning $100,000 a year and reporting only $50,000 in his report and his wife reporting the other $50,000, which she did not earn, what have you to say as to that?

Mr. SUMNERS. She does not have to earn it, it is hers. The courts have decided that it is hers. The constitution may have been wrong, the courts may have been wrong, but they have absolutely decided it is hers, and she does not have to earn it.

Mr. FREAR. It is not a Federal law.

Mr. SUMNERS. But it is a law which the Supreme Court of the United States has recognized as binding on the court in determining these tax questions.

Mr. COCHRAN. Under a law which imposes a tax upon the ownership of a property and not upon the management and control as is stated in this bill.

Mr. SUMNERS. If there is any power in the Federal Government to levy a tax upon a man because he happens to have management of the property I do not find this in the fifteenth amendment, or anywhere else.

Mr. SHALLENBERGER. May I be permitted to interpose a remark there. I think in the appearance of the attorneys who appeared here yesterday for the Department, I asked the question as Mr. Cochran has asked you, perhaps in a different way, but I think it was generally concluded here that this matter we are discussing now, has not been decided by the Supreme Court; but they did venture the opinion that they believed it would be so decided. That, I think, is in the province of a good lawyer to say, in his judgment as to a matter that has never been decided, and that it may be so decided by the Supreme Court.

Mr. SUMNERS. I appreciate that, but the argument must address itself to the sound judgment of the committee.

Mr. SHALLENBERGER. I also know you would grant him that and we are all glad to get your judgment on the other side.

Mr. SUMNERS. I appreciate that.

Mr. HILL. I may say I think my friend yesterday in his statement did not go so far, but he certainly said it merited being submitted to the Supreme Court.

Mr. FREAR. Yes; and I will suggest something which you as a good lawyer I think will agree to. In some of these cases there are dissenting opinions that are very strong opinions. If it is all right and the Supreme Court sustains then you will have it fixed, and then it is for the other side to try and get equality the best they can.

Mr. SUMNERS. It is our contention that the thing has been submitted to the Supreme Court very definitely and determined absolutely to the opposite, and that is what I am trying to argue now.

Of course, there are two or three tests of a proposition of that sort. One is the test of common sense. The other is the test of judicial determination. And the other is the test of governmental policy.

I do not believe it has ever been claimed in any country on earth that merely because a person has management, unless he is a trustee in the ordinary sense, that by levying a tax on him you can compel him to pay somebody else's taxes.

Mr. SHALLENBERGER. That is the real basis of this bill we are discussing now, is it not?

Mr. SUMNERS. Yes. You have got to in some sort of way to have an arrangement under which the earnings may be consolidated as an entity and the tax levied, if that is constitutional. I suppose that is understood.

Identically that thing was attempted in the State from which the distinguished gentleman on your left comes. This Congress cannot go further, it seems to me, than the Legislature of the State of Wisconsin went in attempting to bring about that sort of situation.

Mr. FREAR. There is no question in that case but what the wife was the owner and had the control.

Mr. SUMNERS. If the finding of the Supreme Court means anything, if words mean anything, if the most definite statements mean anything, there cannot be any question here.

Mr. FREAR. But there were three eminent judges in that court who took a dissenting position.

Mr. SUMNERS. But the Supreme Court of the United States took the opinion of the majority in that case.

Now, let us get straight away on this Hoeper case, to see what the legislature of that State did in computing the taxes and the amount of tax payable by persons residing together as members of a family. And that is the only way you can get this.

You cannot but decide the fact that these people own this property equally, that the income is equal, that the right of control in the distribution is equal.

Now, those elements having been determined, there was an opinion by the Supreme Court of the United States to show a vested interest in the wife equal to that of the husband, such an interest that the legislature could have made the wife the management instead of the husband if it had seen fit to do so.

In other words, she had such a property right that she could have been made by the legislature of the State, not only the management of her interest in that community property, but the management of the interest of the husband in that community.

So there is not left for anybody to argue here, any uncertainty as to the fact that there is an equal vested interest of the wife and the husband in these community estates.

The fact that they happen to be married together, except for the legislature's arrangement with regard to management, does not affect their property relationships.

Mr. SHALLENBERGER. Would it bother you to ask your judgment on a question?

Mr. SUMNERS. No, sir.

Mr. SHALLENBERGER. Do you think there is any difference in the right of the Government to legislate the control of the income, and the control of the ownership of property?

Mr. SUMNERS. I want to give you just a horseback opinion about that. Since the value of any property is derived from the right of its use and its income, offhand as to that question as to any difference between the exercise of governmental power in the control of the source of the income that in the control of the income, which in many instances is the only thing that makes possession of property valuable, I have not investigated the question.

Mr. SHALLENBERGER. That is very important in this bill.

Mr. SUMNERS. You know most people own property for the purpose of its use, not just to pay taxes on it, and its use is a personal use, or for the revenue derived from it, and it seems to me there is such a close relationship dealing with powers vested in the governmental agencies that operate under those delegated powers, and such a close ralationship between the property itself and that which emanates from the property which makes the property valuable, that probably there would not be much difference.

Mr. HILL. The Supreme Court has held that the ownership of the income in the spouses is equal.

Mr. SUMNERS. I was just about to make that suggestion. When you tax the income, you tax that to which the person has identically the same title as when you tax the thing from which the income is derived.

Mr. HILL. The court in that case we have been discussing was dealing with income; that was the part of the property that was directly involved.

Mr. SUMNERS. That is what has been involved in all of it. The Government raised the question that the control of the property from which the income came gave the Government the right to tax the income.

Mr. HILL. The community income is property the same as the corpus of the estate, and it might be either the earnings of the spouses or the income of the community property.

Mr. SUMNERS. May I call attention of the committee to what the legislature of the State from which my distinguished friend on the chairman's list comes?

Having in my mind, if I might impress the fact as we progress, that an examination of this question shows that the Supreme Court of the United States in a number of decisions, which makes it stare decisis, and has left no question, and left nobody in a position to pretend to have any doubt, and I say that with all respect, that there is not the slightest difference between the relationship so far as ownership is concerned in the property and in the income of the property, not the slightest difference between the interest of the wife and husband, so that makes this Wisconsin case directly in point.

Mr. FREAR. All of the other attorneys have distinguished in that.

Mr. SUMNERS. They have tried to distinguish; they have done their best. They are representing the Treasury Department that is advocating a bad bill, and they have done the best they could, and I give them credit for that.

Now, if the committee is prepared to have me proceed with this Hoeper case, I want to get this statement in right in connection with this, bearing in mind that while in Wisconsin the property of the husband and wife was separate, or, rather, there was property belonging to the wife and property belonging to the husband, just as it has been decided in these community property cases, one half of the property belongs to the wife and one half to the husband, and one half of the income belongs to the wife and one half of the income belongs to the husband; yet this proposition suggested by the Treasury Department rests upon the fact that the man and woman are married, and not that the man owns the propery, because the Supreme Court has decided against them on that, and not that he owns the income.

They have not a thing to rest this bill upon, except that the man and wife are married.

Now, here is what the legislature did:

In computing taxes and the amount of taxes paid by persons residing together as members of a family, the income of the wife and income of each child under 18 years of age shall be added to that of the husband or father, or, if he be not living, to the head of the family, and assessed to him as hereinafter provided. The taxes shall be paid by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included in the tax computation.

The last clause shows they were not levying the tax against a man but against the total of the receipts of the family, because it is provided that if the man cannot be reached, then they may reach anybody who is a member of that family, whose income went into the total.

Mr. FREAR. In the community property cases where the wife owned independent individual property separate from the community property, is that taxed separately?

Mr. SUMNERS. Yes.

Mr. FREAR. Is that not the distinction in Wisconsin?

Mr. SUMNERS. I would like to make this explanation, under our law, the revenue from the wife's property becomes a part of the community property, and there are one or two exceptions; but I believe it would be confusing rather than clarifying if I would state those exceptions.

There is a disadvantage to the community-property State which would result from the enactment of the Treadway law, because we do not have under our system the advantages of the independent rendition which they have in the noncommunity-property States.

Now, section 7109 of the Wisconsin law under which this litigation arose provides that married persons living together as husbands and wives may make separate returns or general single return, and in either case the taxes shall be computed on the combined taxable income, but exemptions provided for in subsection 2 of section 7105 shall be allowed but once and divided equally, and the amount of the tax due shall be paid by each in proportion to the average income of each bears to the combined average income.

Take those two sections and you will see that the legislature of the State of Wisconsin, with perhaps as effective ingenuity as they could have used, provided and sought to do exactly with regard to the income of the husband and wife, insofar as taxation is concerned, what is sought to be done by the Treadway bill with the community State.

Mr. FREAR. There is only one exemption allowed there.

Mr. SUMNERS. Yes, sir.

Mr. FREAR. I am not familiar with the law, although I know the case. You read the provision of the law that one exemption only should be allowed. Is that right?

Mr. HILL. There is only one exemption allowed in returns of community income.

Mr. SUMNERS. I read subsection 2, but when the committee will take the trouble to examine those two provisions you will find—I have not the slightest hesitancy in making the statement—that the legislature in that case, with perhaps as much ingenuity as could be applied to the effort, sought to make the family income a taxable unit and provided that it should be rendered to the husband, but if he did not pay it the State might pursue any other member of the family; also that they might render separate income-tax reports, but if they did they had to leave it on the basis of a total income bearing the tax in proportion to their interest in it.

I want to read at page 215 in the Hoeper case, and I am not eliminating what at first consideration might be regarded as a holding against the opposition to this bill. I read as follows:

> Since, then, in law and in fact the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the State has power by an income-tax law to measure his tax, and not by his own income, but, in part, by that of another.

To that the holding in the Moore case is applicable. The question is whether the State has power by an income tax to measure his tax, not by his own income but in part by that of another, and that is exactly what was proposed in the other cases, and the

Supreme Court has recited over and over again that one half of the income of that community is the wife's income, it is her own property.

The opinion continues as follows:

It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.

The opinion for this says:

We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the fourteenth amendment.

Now, the members of the committee of course have in mind that the due-process provision in the Constitution which limits the discretion and power of the State government is identical with the due-process clause in the fifth amendment which limits the power of Congress. The language is identical.

Now, reading from page 216 of the opinion in the case just referred to, it says:

Under the law of Wisconsin the income of the wife does not at any moment or to any extent become the property of the husband. He never has any title to it or controls any part of it. That income remains hers until the tax is paid, and what is left continues to be hers after that payment. The State merely levies a tax upon it. What Wisconsin has done is to tax as the joint income that which under its law is owned separately, and thus secure a higher tax than would be the sum of the taxes on the separate income.

I have referred to some provisions there that might indicate a holding against those opposing this bill, but as we proceed it will be made clear that is not true. The opinion further states:

Taxing one person for the property of another is a different matter. There is no room for the suggestion that, qua the appellant and those similarly situated, the act is a reasonable regulation rather than a tax law.

Mr. Frear. May I ask a question?

Mr. Sumners. Certainly.

Mr. Frear. The witness who preceded you gave a distinction between the effect of the community laws of Texas and stated, for instance, that in Texas the husband has practically unlimited control, that is, he can deed the property without the wife's signature, and can do all of these things suggested, and what would be the effect of that in Texas? Is there any difference?

Mr. Sumners. No, sir. That is an interesting thing and is a rather difficult thing to become fixed in the mind of a person who is not living in one of these community-property States.

Mr. Hill. That is really in the nature of a power of attorney to the husband.

Mr. Sumners. Yes; it is. Now, without regard to these various differences in the community-property States, the Supreme Court, having those differences before it, has uniformly held since the modification of the California law, and so far as I know they do not modify at all the facts, which is the important thing here, that the property and the income from the property belongs, as much, to the wife as it does to the husband, and the control of the husband grows out of a matter of public policy, and the legislature could just as well have given that control to the wife.

Mr. Frear. All of the property can be transferred by the husband without the consent of the wife, and she cannot protest.

Mr. Sumners. Yes; and what I am getting at, the Supreme Court, with all of those facts before it, has held that those questions do not deserve the question of ownership in the property itself or in the revenue derived from it.

I think that no one will question that the court has held that the matter of control, the fact of control, does not in the slightest degree affect or disturb the basic fact that the property and the revenue from that property belongs to the wife just as much as to the husband.

Mr. Shallenberger. Just one question I want to ask there. You say the husband can dispose of property without the consent of the wife or the signature of the wife?

Mr. Sumners. Yes, sir.

Mr. Shallenberger. Can the wife do that also?

Mr. Sumners. No, sir.

Mr. Shallenberger. They still recognize the distinction and recognize that the husband has control of the property.

Mr. Sumners. Yes; and the Supreme Court, as I say, has held that he does that as an agent for the community, and for his wife as her agent.

All of those matters have been threshed out a number of times by the Supreme Court, and there are three such decisions in one volume, and I do not suppose anybody connected with the Treasury Department questions that.

If we can get in our minds that all of these things that are confusing do not affect title either to the property or to the income, then as a tax-levying agency, as you gentlemen are, you will know where you are.

Mr. Shallenberger. One other question on that point, because I think it is vital. Could that right of the husband or wife be changed by statute? In other words, could you pass a law in Texas which would authorize the wife to dispose of a property?

Mr. Sumners. If I may, I will ask one of the gentlemen from Texas who are with me to answer.

Mr. Shallenberger. That will be all right.

Mr. R. C. Fulbright. The legislature has full authority to change the control provisions as they see fit. In fact, they have adopted statutes by which the wife may get powers of control, but they have no power to make that which the wife may earn her own property.

It necessarily becomes community property the instant it is acquired. She never obtains anything but a half-interest in the fruits of those labors, but the matter of control is with the legislature, and has been in many respects modified, and under such conditions she may take control, and does do that. We have that very thing happen frequently in Texas.

Mr. Shallenberger. What I had in mind was just how for this right of joint ownership went.

In Nebraska with which I am more familiar, we had the old common-law idea that the husband owned the property and the wife

retained a dower interest, but our legislature under the constitution has so modified that law that the husband is not so powerful as the wife, and he is at the disadvantage in that he cannot bind his wife's property by any contract, but on the other hand he is responsible for her debt to a certain degree.

In other words, when I was a banker my lawyer told me when I loaned money to a man and his wife, and the man signed the note and she signed the security, that unless I wrote on that security, "I hereby willingly consent to this debt", she could defeat me entirely, whereas if I wrote it and she signed the note and signed that statement, she cannot do it.

They have modified those things very drastically in our State to protect the wife, and what I was getting at is whether under your laws or constitution you could modify that matter of control by statute.

Mr. FULBRIGHT. Absolutely; and that has been done from time to time.

Mr. HILL. It is true that in other community-property States it is a matter wholly in the control of the legislature with no vested right in either spouse as to what the legislature does to control it.

Mr. FULBRIGHT. Yes; and in fact in all of the 48 States they have different laws as to the control of property held by the husband and wife.

Mr. SHALLENBERGER. My statement, of course, was not founded on the condition in those States, but the point I was trying to bring out was whether by statute your legislature could provide that the wife could sell the property or control it like the husband does now.

Mr. FULBRIGHT. Yes; they can do that, and not only that, but in many States there have been changes made.

Mr. FREAR. They can do that under the constitution?

Mr. FULBRIGHT. Yes, they can; and that is very settled in the State of Texas.

Mr. SUMNERS. Mr. Chairman, I am going to make just one statement then conclude.

I had in mind to take up the cases cited by the proponents of this legislation and undertake to show that these trust-creating cases that they have cited are to be distinguished from community-property cases, because in the community-property litigations the courts always held that the property belonged to the wife the minute it was acquired.

In the California case where a man sought to put his earnings and the income from his property and the earnings of his wife, where they made an agreement between themselves, the court held that he was to be taxed upon his income because he earned it, and the tax attached before he could get it into this common fund.

In the case of a revocable trust a man sought to put his own property out subjected to a specific use, and the court held that he had a right to revoke which prevented its passing, so that the provisions of the law levying a tax on a part of the income would not attach.

In the case by Mr. Justice Cordoza, I am going to leave that case for some of the other gentlemen to discuss, if the committee desires to hear them.

However, I do desire to direct the attention of the committee to a very brief statement to be found at page 178, volume 289, in the opinion by Mr. Justice Roberts in the case of Reinecke against Smith, as follows:

> The case is plainly distinguishable from *Hoeper* v. *Tax Commission* (284 U.S. 206), on which respondents rely, for there the attempt was to tax income arising from property always owned by one other than the taxpayer, who had never had title to or control over either the property or the income from it. The measure of control of corpus and income retained by the grantor was sufficient to justify the attribution of the income of the trust to him.

There the court draws the distinction I have been insisting upon that in these cases there is that clear distinction between those cases and a number of cases cited by the proponents of the bill, from which they reason by analogy.

Mr. SHALLENBERGER. Before you conclude I would like to ask you one question which I know you can answer at once.

Is it your judgment that this bill, if passed and enacted into a law, would affect only the rights of the people in the community-property States and the amount of taxes they should pay?

Mr. SUMNERS. It is just as clear in the bill as can be that is what they intend to do.

Mr. SHALLENBERGER. Where is the provision in the bill that provides that? I know that has been stated several times.

Mr. SUMNERS. I do not believe that the gentleman who represents the Treasury will have any other statement than that this bill is to apply only to the eight community States.

Mr. HILL. I want to know the difference of opinion as to how far-reaching that opinion is.

Mr. SHALLENBERGER. I ask you that question because I think you observed in the questions of Mr. Frear here that we might consider modifications of the law whereby to make it more directly apply to all of the States, seeking to get a law uniform for all, and in your opinion, I believe, this law does not do that.

Mr. SUMNERS. I believe the representative of the Treasury will so state.

Miss CARLOSS. Mr. Chairman, I am sure there is no intention on the part of the Treasury to have it reach anything except these eight States.

Mr. SHALLENBERGER. I am glad to have that cleared up.

Mr. SUMNERS. I thank you gentlemen very much for the courteous hearing you have given me.

Mr. SHALLENBERGER. We thank you for your statement.

The subcommittee will adjourn until tomorrow morning at 10 o'clock.

(Thereupon the subcommittee adjourned until 10 a.m. Friday, May 4, 1934.)

COMMUNITY PROPERTY INCOME

FRIDAY, MAY 4, 1934

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE OF THE COMMITTEE
ON WAYS AND MEANS,
Washington, D.C.

The committee met at 10 a.m., Hon. A. C. Shallenberger (chairman) presiding.

Mr. SHALLENBERGER. The committee will be in order.

Congressman Sumners, of Texas, has asked to be permitted to add to his remarks of yesterday, and we shall be pleased to have him do so at this time.

Mr. SUMNERS. Mr. Chairman, I thank the committee very much for the privilege of making merely a suggestion for the consideration of the committee. I hope—in fact, I am sure—the committee will consider, when it comes to determine what it shall do with reference to the Treadway bill, whether such a legislative device as this meets the constitutional requirement with regard to geographic uniformity. Admittedly this operates with reference only to eight of the States, in connection with which it is sought to compel one rendition of the revenue from the property of husband and wife which in other States under existing law a husband and wife would not be compelled to do. So that, in view of the known fact that it will operate only within eight States, I ask the committee to consider whether it meets the constitutional requirement with regard to geographic uniformity.

Of course, the equities also are involved; whether, even if you had the constitutional power, this would be the right sort of thing to do. I do not desire to take up the time of the committee to argue either of those propositions. But it seems to me that they are important for gentlemen who have your sort of legislative responsibility to consider.

I am merely undertaking to do the service of submitting this suggestion to you in connection with what I have already said.

I thank you very much for your courtesy.

Mr. SHALLENBERGER. We appreciate the suggestion, Mr. Sumners.

The first witness on the calendar this morning is Judge George Donworth, of Seattle, Wash.

STATEMENT OF HON. GEORGE DONWORTH, SEATTLE, WASH.

Mr. DONWORTH. Mr. Chairman and gentlemen of the committee, my name is George Donworth. I live in Seattle and have practiced law there for a long period of time. Before going to Seattle I practiced law in the State of Maine for several years and am, therefore, a member of the bar of two States having very diverse laws relating to domestic relations and the property rights of married persons.

I was counsel for the taxpayer Seaborn in the case of *Poe* v. *Seaborn;* conducted that case through the three courts—the District Court, the Circuit Court of Appeals, and the Supreme Court of the United States.

The committee is giving very patient, intelligent, and careful consideration to this bill, H.R. 8396, which it is proposed to enact and which provides that—

for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse who has the management and control thereof under the law of the jurisdiction in which the marital community exists, and such spouse shall alone be entitled to the deductions and credits allowed under the internal-revenue laws, which are properly allocable to such property or income.

I take it there are three questions with which the committee is very much concerned in the consideration of this bill. They may be stated in any order.

One question is, Is this bill fair to the taxpayers whom it affects?

Second, Is it constitutional under the Constitution of the United States?

And third, Would it, if enacted, accomplish a beneficial and useful purpose?

We counsel for the taxpayers in the eight community-property States have the view that each of those questions should be answered in the negative, and we cherish the hope, a confident hope, I might say, that this committee will agree with us in giving negative answers to each of those three questions.

I will not attempt in my remarks to divide the argument or the presentation along any particular line, because these three questions constantly run into each other. The committee will be able, I trust, to pick out and allocate, so to speak, what I may say as I go on so as to make the application to the different questions involved.

This proposed enactment is unjust for a number of reasons. Let me at the outset call attention to one reason why it is unjust. This bill proposes to take the statute law of eight States and to follow the provisions of that statute law and to give to that law application up to the point where it would increase taxes, and then to depart from that law and to refuse to give further recognition or effect to that law insofar as the consequences of that partial adoption of the law would lead to results favorable to the taxpayer.

If I ask a rhetorical question now and then, I may say that, of course, I ask the answer only in the report of the committee and not now. Now, is any proposition fair in a union of 48 States which says to 8 States, "We are going to give effect to your law up to a certain point, and then we are going to disregard your law"? The negative answer seems perfectly obvious. The proposed bill makes use of the State law to combine two incomes into a marital partnership and then to refuse recognition to the concomitant provision of the State law which says that this combined income is the property of two persons, not of one person alone. Where does the bill get the right to unite these incomes at all if the State law is not to have effect?

Again, there are eight community-property States, and there are as many community-property systems as there are States. All that they have in common is that there is a partnership of husband and wife, compelled by law, created by law, and which takes effect when the marriage contract is made and continues until death or divorce. But the statutory "articles of copartnership" so to speak, differ in every one of the eight States.

These eight States adopted those laws in the infancy of the States. It is impracticable and really unthinkable that any State which has grown large and populous and rich under its own system of another kind should ever adopt the community-property system and try to assimilate its property conditions to that system. It cannot be done, and I think the committee will see that it never will be attempted.

Every one of these States has such a law adopted in its infancy. Property has been acquired in those States, the States have grown in population and in other respects, and property rights have developed along the lines of that law. That system cannot be eradicated in those States, and it cannot be transplanted, in my judgment, to any other State.

Mr. SHALLENBERGER. I am very much interested in that statement. Would you mind an interruption?

Mr. DONWORTH. I should like to have you ask any question that comes to mind, sir.

Mr. SHALLENBERGER. What you are saying is that when these eight community-property States came into the Union they had this principle of law as a part of their fundamental law?

Mr. DONWORTH. They did. I am sorry the gentleman from Wisconsin (Mr. Frear) is not here this morning. May I ask if he is expected?

Mr. SHALLENBERGER. I just had the secretary telephone to find out. Mr. Cochran is unavoidably out of the city, and Mr. Frear said he could not get here perhaps throughout the whole sitting today. He is detained elsewhere, I am sorry. We concluded, therefore, to proceed.

Mr. DONWORTH. The statement was made by the gentleman from Wisconsin—"statement" is too strong a word—the thought was thrown out by him that the present system is unjust for the reasons that the committee have heard stated here; that if a different system of community-income taxation were applied in the eight States, there would be relief to the taxpayers of the other States.

Before I answer that proposition on the basis of fairness, which I shall do later, let it be answered on the basis of law and constitutionality.

What is the basis of this whole Federal income tax and the law applicable to it as a national proposition? The basis, of course, is first, the Constitution of the United States and, second, the interpretation of the Constitution made by the Supreme Court in the case of *Pollock* v. *The Farmers Loan & Trust Co.* in 1895.

In the administration of President Cleveland, Congress passed an income-tax law in a general way along the lines of the present law, varying, of course, much in detail. The Supreme Court of the United States held that law unconstitutional, because the Court said—and this touches closely the controverted point—an income tax is a direct tax and under the Constitution of the United States

direct taxes can only be levied by apportionment among States in proportion to the census enumeration.

Well, what was the result? That particular law, of course, fell. But it was open to Congress to enact another income-tax law by adhering to the Constitution as it then read, which would mean this: If Congress wanted to raise, we will say, 500 million dollars by income taxation, it could do so without any amendment to the Constitution. But it would have to take the census of the United States and ascertain that New York, we will say—I do not know what the fraction is, but I imagine it is about one-twelfth—New York has one-twelfth of the population of the country.

Then exactly one-twelfth of $500,000,000, no more and no less, would be paid by the taxpayers residing in New York. The incomes of New York, therefore, would be charged only with Federal income taxes sufficient to raise one twelfth of $500,000,000. The same relative proposition would apply in Massachusetts. It was out of the question to have any income-tax law enacted by Congress under the Constitution with that interpretation. Why? For a number of reasons, but for one particularly. A goodly number of fairly populous States were relatively low in wealth. Mississippi perhaps said, with justice, "We should not pay income taxes on a population basis." For obvious reasons it was impossible to get through Congress a bill that would impose income taxes on a population basis.

What was the alternative? The alternative was to relieve Congress from that provision of the Constitution which required the apportionment between the States. Now, coming more down to date, the Supreme Court has said, since the adoption of the sixteenth amendment, that an income tax is still a direct tax, the same as it always was. The Court still adheres to the authoritative construction of the Constitution that an income tax is a direct tax. That authoritative construction was not overruled by the sixteenth amendment. It was accepted by that amendment.

So, in construing anything relating to an income tax, we must bear in mind what the Supreme Court bears in mind all the time, namely, that the income tax is a direct tax, imposed by reason of ownership and computed in proportion to incomes rather than in proportion to population.

The honorable Mr. Treadway thinks that, under existing provisions of law, some injustice is being done to Massachusetts. From his opening statement here a few days ago—and of course he spoke in the utmost good faith—I think it appears that acting in the very best of faith he has so far failed to grasp the principles of the community-property system. We are reminded of the French proverb that to know all is to pardon all. We are very far from asking for the community-property States anything in the nature of a pardon, but we do ask to be understood. It would be both unwarranted and unfair to say that we adopted this system for any selfish reason. We do ask to be understood, and we feel that when we are understood we will get justice from this committee and from the Congress of the United States, including the gentlemen of the committee who have indicated a feeling in favor of this bill.

Mr. Treadway expressed the view that Congress should enact this bill so that the legislatures of eight States will not be able to "manipulate"—I think that was the word he used—"manipulate" their local laws so as to give themselves an advantage over the taxpayers in other States.

Let me say to the committee that the community-property law of Washington was in full force and vigor 40 years before the adoption of the sixteenth amendment. It was passed in 1869. During the first 10 years of its existence it underwent certain modifications, one of which came before the Supreme Court of the United States in the case of Warburton against White, on which Mr. Sumners has so clearly commented. But from 1879 down to date there has been no substantial change in the law of Washington and no change that would affect any question pending before this committee. While I cannot speak for the other seven States, I think it may be said that it is true also of them that there has been no substantial change in their community laws that would affect Federal income taxes since a date long prior to the adoption of the sixteenth amendment or the passage of any income-tax law by Congress.

There is one exception, which was called to the attention of the committee yesterday by the Representative from California, Mr. Evans. The change in California may be called the filling of a hiatus, because the change was in conformity, in pursuance of, the community-property idea. But it was important enough to change, as to California, the application of the rule fixed by the Supreme Court of the United States as the basis of taxation of community income. Seven States have maintained their marital laws without change in any material point for many, many years, way back of 1913, with no thought of Federal income tax.

Is it fair to say to the taxpayers of these States, "You manipulate your local laws to get an advantage in the matter of Federal taxation"?

When the Federal Constitution was adopted by the Convention in 1787, there was a compromise between those who favored a centralized, unified Nation and those who favored a mere confederation of independent States.

We are all satisfied with that compromise, but in a compromise one party gives up and another party gets, under the give-and-take idea.

Now, what did we give up, speaking as States, to the Federal Government? We granted the right to levy taxes of various kinds. Excises can be levied throughout the United States, and so forth. We granted to the United States the right to levy an income tax, the nature of which I have already discussed, and the change later made in the Constitution as to that kind of tax. But the States did not give up in one iota the right to say what shall constitute a marriage; what shall be the results of that marriage; what shall be the property rights of married persons. And they did not give up or impair their individual right to determine the origin of titles to property among married or unmarried persons.

The whole question of how property originates, who owns it when it does originate, how it is to be transferred, and who is entitled to the usufruct and beneficial enjoyment—that whole question is just as much (and I say it as emphatically as I know how)—that is just as much within the unimpeachable powers of the several States as if the Federal Union had not been formed. There is but one exception. That one exception is that since the fourteenth amendment, adopted in 1867 or 1868, a State cannot deprive a person of prop-

erty without due process of law, when that person has once acquired it.

Now, with the exception of the fourteenth amendment, gentlemen, each State has a perfect right, as much right as a foreign country has, to enact its laws on these subjects without any control on the part of the United States.

It is for this reason that every one of the 40 non-community-property States has exercised that right. The idea is sometimes thrown out that the community-property system is something exotic; that it does not belong in America; that a State adopting it is a sort of Cinderella among the more favored sisters of the Union. I believe—I do not state that as a matter of fact, because I have not the statistics, but it is my belief that you will find that in the last 60 years there have been far more modifications of the property rights of husband and wife in the non-community-property States than in the community-property States.

Now, does anyone claim that any State is acting today under the common-law system of marital property rights? The rules of the common law relating to property rights of husband and wife were barbarous. Every State has got away from them.

Further, let us remember that there is no such thing as a national law, a national system, a national idea of property rights of husband and wife. There is no uniformity. Even in these eight community-property States there is not uniformity. The eight community systems are alike in this, that they all make the husband and wife partners as to all property acquired during marriage as long as the marriage continues, until dissolved by death or divorce. They differ much in important details.

When you come to management and control it differs in every one of these eight States. Yet "management and control" is made the basis of taxation in the pending bill as if it were a definite thing. The fact is that when you once depart from the trail well blazed by the Supreme Court, the trail of ownership, you get into a hopeless morass of doubtful substitutes.

Gentlemen, I am aware that I am not following any logical order, but I am taking these thoughts up as they occur to me. Take the matter of management and control in the State of Washington. It does not mean what it means in Texas or Louisiana or any other State. So, if you should take those words as a talisman, the magic thing that is going to form the decisive test of the application of the direct tax under the sixteenth amendment, you would be adopting a very variable term.

Let me speak of the rights of husband and wife as to management and control in Washington. First as to real estate.

A husband can buy real estate on his own judgment. Take a man who has got $10,000, earned or acquired in speculation, or obtained in any other lawful way, during marriage. He says, "I believe Seattle real estate is going to rise in value." He goes out and buys a lot for $10,000. So far he acts on his own judgment as the manager of the community.

Then he says, "Now I think I will put up a building on that lot, and I want to borrow money by putting a mortgage on it." He cannot borrow a dollar without his wife's signing the mortgage. Has he unfettered management and control?

When, with his wife's consent, he has borrowed the money and given the mortgage, he has the building put up. We will say the whole property is worth $20,000. Then he says, "Now, to get an income, of course, I must lease that building." He cannot make a lease without his wife's signing. The most he can do is to put in a tenant at will, oustable in 30 days. He is powerless to make the property productive without his wife's voluntary joining in the lease. That is the extent of his "management and control" as to real estate acquired as community property which the husband wishes to retain and get an income from.

Now, suppose later he says, "I believe it would be good policy to sell that property and cash in the profits that can now be realized. We can do better with the money." And he says to his wife, "Let us sell out that corner lot and building." The wife may say, "No. I believe that is a safer investment than the things that you want to buy with the money." And he cannot convert that real estate in money or anything else unless his wife signs the deed.

In the case of *Itkin* v. *Jeffery* (126 Wash. 47), Itkin bought a piece of land by a deed signed by Jeffery and wife. His negotiations were with the husband, Jeffery. Later Itkins brought a suit in equity to reform the deed because he claimed important stipulations in regard to the property intended to be conveyed were left out. He made out a good case against Jeffery. The attorneys for the defendant called Mrs. Jeffery.

"Did you ever hear anything about this mistake?"

"No," said she.

"What did you do in connection with this transaction?"

"Why, my husband told me he was selling the property for so much money, and he showed me the deed, and I looked it over and I thought it was all right and so, I signed it."

Itkin's suit for reformation of the deed was thrown out. This is another actual illustration of the "unfettered command and unfettered control" which this bill would make the basis of the tax, taking the income to the husband in place of taxing it to the two persons who are declared by State law to be the owners of it.

Suppose a little later the wife dies.

The husband then finds that he owns only one half of that property in common and undivided. Who owns the other half? If his wife did not leave a will, the other half is owned by her children. They may be his, too, or they may not. Her half goes to her children unless she makes a will. And if she makes a will, it goes to her devisee, even though he be her unlawful lover. The United States gets an estate tax on the half that passes by her death to her children or her devisee.

In the case of personal property, the words of the Washington statute are couched in broader terms. It says, as Miss Carloss read yesterday:

> The husband has the same control over community personal property as he has over his separate estate.

But the construction of the statute by the State supreme court has very much narrowed the effect of the statutory language. The wife is amply protected by the courts whenever the husband undertakes to use any community property, whether real or personal, otherwise than as the bona-fide agent of the community.

Let me call attention also to another thing which is not always in our minds when we hear these provisions read. When the husband has the right of sale—and in personal property he has the right of sale—the mutations of the property are still community property. He is like a trustee who can change investments. He cannot convert them into his sole property at all.

I think perhaps if I should read, at the risk of being a little tedious (because this is very important), from the opinion of just one case, the language of the court will make some of these points clear. There are many similar cases, of course. I will read from the case of *Schramm* v. *Steele* (97 Wash. 309). Schramm brought suit against Steele, a married man, for alienation of the affections of his wife, Mrs. Schramm. Schramm recovered a substantial judgment against Steele. Then, finding that Steele has no separate property but that Steele and wife owned community property Schramm brought a creditor's bill against Steele and Steele's wife, praying that their community property be subjected to the payment of his judgment. He failed to collect a dollar. Both real and personal property, principally personal property, were involved here. Notwithstanding that the statute appears to give to the husband broad powers in respect to community personal property, saying "The same power of disposition as of his individual estate", the court held that the context and the other sections of the law require that a narrow construction must be applied to the words of the statute.

Here is what the court said:

> The same circumstances, all of them and no others, which make real estate community property make personalty community property. Two kinds of property are impressed with the community character by the same facts and by force of the same words in the same defining statute. All property, whether real or personal property, and pecuniary rights without exception, acquired after marriage by either husband or wife, or both, otherwise than by gift, bequest, devise, or descent, is community property. The provisions of the statute entrusting the husband with the management and control of the community personal property, with a like power of disposition as he has of his separate personal property, except that he shall not devise by will more than one half thereof, must be construed in the light of this dominant fact of ownership. * * *

Let me interject a parenthesis here. It is a digression. The members of the committee will notice and have noticed that the Supreme Court of the United States, in upholding any income tax, always goes to ownership. The cases cited by our friends on the other side in support of the pending bill I will refer to in detail later. I think I will show that the cases they cite merely bring out variations of ownership. Those cases only make stronger the fact that the Supreme Court of the United States always sticks to ownership in upholding an income tax.

It would be a strange coincidence, would it not, if that word "ownership" were used in the opinions of the Supreme Court of the United States always in connection with an income tax, if ownership were not the necessary basis of the tax? It would be strange if that were a mere coincidence. It is more than a coincidence; it is a requirement.

Going back to *Schramm* v. *Steele* (97 Wash. 309), the Court says further in that opinion:

> These statutes must be construed in the light of the dominant fact of ownership. The property referred to is community property; that is, property belonging to the community. The husband is made by statute the manager and not the owner. His management and control include the power of absolute disposition, but only for the community. Else there is no such thing as a vested property right in the community as to any personal property, since the husband could give away all such property in any manner he pleased, except by will, at any time during the existence of the community. To hold that the whole substance of the term "community property", as applied to personalty, consists in a mere contingent expectancy of the wife would make the term "community personal property" a palpable misnomer. It would take away every community element except that the wife's labors and sacrifices had helped to earn it. It would destroy that equality which it is the obvious purpose of our community-property laws to conserve. These considerations make it plain that the statute, in conferring upon the husband the management and control of the community property, though giving him the absolute power of disposition of community personalty, intends no more than to make him the statutory agent of the community (*Marston* v. *Rue*, 92 Wash. 129). The words of the statute are generally no broader than those often employed in general powers of attorney for the management and disposition of personal property. But we have yet to learn of a case in which such a power, however broad, was held to destroy the estate of the donor of the power and subject the property to the personal debts of the attorney in fact.

Now, that is the law of Washington as stated in this and many other cases, which I would like to cite in a brief later on.

Let me read now from a decision of the Supreme Court of the United States on the question of whether there is such a thing as a common law of the United States; because that underlying thought is thrown out here as an assumption—that these eight community property States are not playing the game fairly because they are departing from the common law. Of course, as I have said, all the other 40 States have departed and are departing from the common law every day. Our eight States have simply done what they have a right to do and what the other 40 States have a right to do and are doing.

In the case of *Smith* v. *Alabama* (124 U.S. 465), the court said:

> It has never been doubted but that this entire body and system of law regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the legislature of each State except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the defense of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. It was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained, with such legislative powers as are therein granted expressly or by reasonable implication.

In a very recent case (*Ohio* v. *Agler*, 280 U.S. 379) the Supreme Court said:

> It has been understood that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

What is proposed here is that in eight States ownership shall be departed from and that management and control will become the criterion of taxation for incomes. Well, we say, for one thing, that making ownership in 40 States the criterion, and management and control in 8, is unfair, aside from any other consideration.

But the main question here of constitutional right has been absolutely settled, I think, by the decisions of the Supreme Court of the United States, some of which were discussed by the Chairman of the Judiciary Committee, Mr. Sumners, yesterday in his address to this committee. He cited the decision of that Court in the case of *Warburton* v. *White*, and he mentioned, I believe, in that connection—I at least call attention to it in that connection—the case of *Arnet* v. *Read* (220 U.S. 311). Both of those involve constitutional questions.

The Warburton case arose in the State of Washington on account of the change in the community-property law that took place during the first 10 years of its existence between 1869 and 1879. (It has not been substantially changed since 1879). *Arnet* v. *Reade* came from New Mexico when it was a territory and involved the community-property law of New Mexico.

In *Warburton* v. *White*, as has been so clearly pointed out by Mr. Sumners, this state of facts developed. The property was acquired—it was real estate in or near Tacoma—it was acquired by a married man during the early period when under the Washington statute the husband could convey real estate without his wife's joinder. Later, the law was changed so as to require the wife's joinder in a deed or mortgage or encumbrance. Nevertheless, the husband made a deed without his wife's joinder, and the subsequent grantee—I think it was Warburton—claimed that the husband's sole deed gave him a good title. He brought suit to quiet the title. He asserted in court that because the husband had the sole power of disposition when the real estate was acquired, he retained that sole power after the statute was changed.

The court uses the language which has been so clearly expounded by Mr. Sumners. The court held that the husband was not deprived of any constitutional right whatever by the statutory repeal of his former statutory agency.

The case of *Arnet* v. *Reade* from New Mexico was a similar case. There community real estate was acquired during a period when the husband had the sole power of conveyance. The Legislature of New Mexico later passed a law requiring the signature of the wife to such a conveyance. The husband claimed that he still had the power of disposition as to previously acquired community property. My impression is the territorial court of New Mexico sustained him in that view. However that may be, the Supreme Court of the United States (Justice Holmes delivering the opinion), held that the wife's interest in community property, even at a time when she had no voice in its disposition, was a vested interest of which she could not be deprived without her consent under the fourteenth amendment to the Constitution of the United States.

So, taking those two cases together, we submit that the contentions made there were the same as those made here by the proponents of the pending bill. The idea of the unsuccessful parties in those cases was the same as the idea advanced by the supporters of this bill, that the wife's interest is not a genuine property right, that it is a mere fiction asserted in order to get some unfair advantage.

Of course, there was no question of taxation involved in those cases, but there was involved and decided—in the negative—the claim that the husband is the true and substantial owner of community property. The Supreme Court of the United States said in both these cases that what the wife has in community property is a genuine and valid property right which cannot be taken away without violation of the fourteenth amendment. And the court said in the Warburton case that what the husband has over and above the equal ownership with the wife of his community (one half), namely, the statutory agency of management and control, is not property and can be taken away from him without a violation of the fourteenth amendment. This holding does not question the husband's vested interest so far as his half interest is concerned, of course, but is very clear so far as his statutory power of management and control is concerned.

What is proposed here in the pending bill is this: It is solemnly proposed to make the criterion of taxability of the community income something that the Supreme Court of the United States has said in the clearest terms is not property.

It is proposed to make "management and control" the basis of taxability, that is a mere statutory power which it is said in *Warburton* v. *White* can be taken away from the husband without any violation of the fourteenth amendment, because it is not property.

Mr. HILL. Will you make that statement again, Judge?

Mr. DONWORTH. I say that it is solemnly proposed here to make the criterion of taxability of an income something that the Supreme Court of the United States has said is not property and can be taken away without any violation of the fourteenth amendment, namely, the husband's power of management and control. And it is proposed to ignore the thing that the Supreme Court of the United States says is property and is vested, and cannot be taken away without a violation of the fourteenth amendment, namely, the wife's equal one-half interest in the ownership of the community income.

We say that it cannot be claimed in the face of these decisions that there is any open question as to "control and management" being the equivalent of ownership in the case of community incomes. The Supreme Court of the United States has definitely and positively said "no."

Mr. SHALLENBERGER. Would you mind if I asked a question at this point? You have a good deal of information about the laws of community-property States, and especially of your State. I take it from your statement that there was a time when the husband really had the right in those States to dispose of real estate without the wife's signature; is that right?

Mr. DONWORTH. In the State of Washington he had that power for a few years in the beginning; yes, sir. With the qualification, of course, that the proceeds of any sale that he might make would still be community property. He could not make the proceeds his separate property.

Mr. SHALLENBERGER. And that the Supreme Court of the United States has held, in your opinion, that the husband could not alienate or take away from the wife her right to her property?

Mr. DONWORTH. That is not exactly the thought, if you will pardon me. The direct question in both cases was whether the fact that the husband had the sole power of disposition—of conveyance—of the property had any bearing upon the question of ownership of the

wife of the half interest. The Court said "no" in both *Warburton* v. *White* and *Arnett* v. *Reade*, saying that her ownership, being clearly fixed and declared in the statute, was there regardless of the absence of necessity for her to sign the deed.

Mr. SHALLENBERGER. That is the point I was leading up to. Is it recognized in the decisions of the courts, and is it or is it not provided by statute in the community-property States that the wife must sign the conveyance of community real estate?

Mr. DONWORTH. I will ask the gentlemen representing the taxpayers of the other community-property States to answer individually on that. In Washington no deed, mortgage, lease, or other encumbrance of community real estate is valid unless executed by both spouses. My understanding is that in some of the other seven States the husband can convey or encumber without his wife's joinder. The legislature can change that, of course, either way, as the Supreme Court has said that management and control are not property rights protected by the fourteenth amendment.

Mr. SHALLENBERGER. Those States recognize that as a settled question and therefore they have enacted changes in the statute?

Mr. DONWORTH. Yes, sir.

Answering the chairman's question more specifically, I do not think there is any decision to the contrary of those two (*Warburton* v. *White* and *Arnet* v. *Reade*) in their holdings that the fact that the wife's signature is not needed to a deed has no bearing upon the nature of her interest in the property or in its income.

Mr. Evans will, of course, treat of the law of California, and if I err in my references to it, I hope he will correct me as I go along.

Reference has been made to the well-known Robbins case, *United States* v. *Robbins* (269 U.S. 315). That was the first case in the Supreme Court of the United States involving the question whether California taxpayers, in the case of community property, were entitled to divide the community income between husband and wife. The Court held in that case that it should all be taxed to the husband, because the wife's claiming an interest therein was a mere expectancy. The later California case is *United States* v. *Malcolm* (282 U.S. 792), where the holding went the other way, because in the meantime California had changed her statute by inserting provisions giving the wife a vested half interest.

The Robbins case was decided, if I am not in error, in January 1926. The courts of California had held up to that time that the Wife's interest in community property was not a vested interest but a mere expectancy. The decision did not in the least turn on the point that her signature was not needed to a deed of community real estate. But the question had been raised in California courts several times as to whether she was a mere preferred heir, so to speak, or whether she had a present vested interest during her life. The Supreme Court of the United States in the Robbins case analyzed those State decisions of California and said it was clear from the State decisions that the wife had a mere expectancy, which I call a preferred heirship. I do not think that expression is in the case. So the Robbins case held that in California the husband was the sole owner of all community property, both real and personal, and necessarily therefore the sole owner of the income; and consequently the entire income was a single income to be taxed against the husband alone.

Mr. SHALLENBERGER. Who was it held that?

Mr. DONWORTH. Justice Holmes wrote the opinion.

Mr. SHALLENBERGER. The Supreme Court of the United States?

Mr. DONWORTH. The Supreme Court of the United States; yes, sir; in January 1926. When that decision came out, the people of California did not like it, of course, and so the legislature changed the law. They passed a statute which made the wife the equal owner of community property, real and personal, with the husband.

The legislature of California made that act prospective, that is, applicable only to property acquired by married persons after the date of the act. So that in California now, in making income-tax returns, property acquired before the year 1927 (the date of this new statute) is treated as the sole property of the husband and its entire productive income is taxed to the husband. He pays the entire tax and the wife is not concerned. But any savings that the thrift of the husband and wife have accumulated after 1927 and that have gone into an investment, those accumulations are owned by the two jointly, and each pays a tax on one half of the productive income of that property.

When that new statute came before the Supreme Court of the United States the question was: "What now as to the new acquisitions of husband and wife since the 1927 act and the productive income thereof and current earnings? The Court answered: "Why, we settled that in *Poe* v. *Seaborn* (deciding the question of community incomes in Washington. It is owned 50–50 and must be taxed accordingly."

That decision was *United States* v. *Malcolm* (282 U.S. 792).

Mr. HILL. The Poe-Seaborn case was not from California?

Mr. DONWORTH. No; from my own State of Washington. Those decisions from California, in the Supreme Court of the United States, are of great significance in that they held that under the California law prior to 1927 the wife had no proprietary interest in community income, and the husband must, therefore, pay the whole tax, just as this bill would make all husbands in 8 States pay it, but as soon as California assimilated its situation to that of the other 7 of the community-property States, the Supreme Court said, it is different, and the wife should return and pay one half of the community income tax.

Mr. SHALLENBERGER. Can there be degrees of ownership in law? Has the Court interpreted that question?

Mr. DONWORTH. When you ask if there may be degrees of ownership, do you mean there may be degrees in the sense of divided interests?

Mr. SHALLENBERGER. My question is addressed to this thought, that you brought out very clearly, that while some of the States held, before the statute was changed, the husband apparently had complete control, yet the Court has decided she did have a well-defined interest. After the legislature has by enactment decreed that in the community State she has that element of ownership, is there any difference in the matter of ownership in those two situations? After all, just how far does the effect of this management and control

go, and what are the shades of it, and does it conflict with the idea that taxation must be made on the basis of actual ownership?

Mr. DONWORTH. I think I would answer that suggestion along this line: What the statute says about management and control is perfectly immaterial on the subject of ownership. According to the Supreme Court of the United States it is an immaterial circumstance. The statute might give it to the husband alone; it might give it to the wife alone; it might give it to them jointly; or it might require a marital trustee in every case. The Court held that in Warburton against White and in Arnett against Reade, and it applied that holding specifically to Federal income taxes in Poe against Seaborn. The question of ownership and of taxability depends upon other things in the statute than the question of control and management. The important question is: What does the statute say in defining the property interests? The community-property statutes usually are something like the Washington statute. Before they get to any question of management or control at all they start in by saying in substance: "All property acquired by any married person after marriage, except in certain definite definite ways like inheritance, and so forth, shall be common property of the two spouses." That is the determining thing, what the statute says about the property interest and ownership, and not what it says about the question of managing or controlling or signing deeds, though I want to repeat that in Washington the wife shares with the husband the control and management in many important respects.

Let me get to the question of how it happens that ownership is the important thing in the matter now before the committee. The case of Pollock against Farmers Loan & Trust Co. held that under the Constitution as it read in 1895 no income tax could be levied unless in proportion to population. That led to the adoption of the sixteenth amendment, which took effect in 1913. Of course, a great many cases have been before the Supreme Court since the adoption of the sixteenth amendment to construe its effect in various ways. Two of the earlier cases were known as the stock-dividend cases. The first of those is *Towne* v. *Eisner* (245 U.S. 418).

That is known as the first stock-dividend case, and there the question was whether a stock dividend (where a corporation instead of paying out dividends in cash turns a part of its surplus into capital stock and distributes the new stock to former stockholders pro rata) was taxable as income when received by the stockholder. There was no express provision in the act on the subject. The Supreme Court held that the stock dividend was not income. Then Congress passed an act expressly declaring it to be income and taxing it as such. Then the question came before the court again, and that is the second stock-dividend case, *Eisner* v. *McComber* (252 U.S. 189). In this second stock-dividend case, the Court, referring to the first stock-dividend case, said: "The Court treated the construction of the act of October 1913 as inseparable from the interpretation of the sixteenth amendment", and having referred to the income-tax case of *Pollock* v. *Farmers Loan & Trust Co.* (158 U.S. 601), and having quoted the amendment, proceeded very promptly to say there, quoting in the second case from the first: "It is manifest that the stock dividend in question cannot be reached by the income-tax act and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income." Later, in the opinion in the second case, the Court said: "The sixteenth amendment must be construed in connection with the taxing clause of the original Constitution and the effect attributed to it before the amendment was adopted."

In the income-tax case of *Pollock* v. *Farmers Loan & Trust Co.* (158 U.S. 601), under the act of August 1894, during President Cleveland's time, it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership, and that Congress could not impose such taxes without apportioning them among the States according to population, as required by the original Constitution. Continuing from the same opinion: "Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress, it is evident that the sixteenth amendment was adopted in words lucidly expressing the object to be accomplished", and, quoting the amendment, "Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States and without regard to any census or enumeration." Continuing, the opinion said "As repeatedly held, this did not extend the taxing power to new subjects but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes on incomes." The opinion cites some authorities where the court has held that, and then continues: "A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property real and personal. This limitation still has an appropriate and important function and is not to be overridden by Congress or disregarded by the courts."

Later, in the case of *Bromley* v. *McCaughn* (280 U.S. 124), the Court sustained the validity of the gift tax imposed by the Revenue Act of 1924, and there held that the gift tax was not an income tax at all, but an excise tax and therefore not within the sixteenth amendment. I think the members of the committee readily see that there is a distinction between an excise tax which does not necessarily have regard to ownership, such as an excise on the sale of tobacco or liquor and other things. In the case of income tax it is very different, because that is a direct tax on the owner of the income.

This distinction is pointed out in the case of *Knowlton* v. *Moore* (178 U.S. 41). There the Court upheld the estate tax, imposing what are otherwise known as "death duties", and they upheld that tax as an excise. It is well, I think, for the committee to bear this in mind in reading some of these cases in connection with excises, that the question of ownership is not necessarily involved and only comes in very indirectly. It is purely a question of statutory construction as to what is taxed by an excise, because that is not a direct tax as the income tax is. In Knowlton against Moore, the Court said, among other things: "In construing the uniformity clause of the

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Federal Constitution, and giving to the term uniformity as applied to duties, imposts, and excises a geographic significance, likewise causes that provision to look to the forbidding of discrimination as between States by the levying of duties, imposts, or excises upon a particular subject in one State and a different levying of duties, imposts, or excise upon the same subject in another, and therefore, as far as may be a restriction in the same direction, and in harmony with the requirement of the apportionment of direct taxes." And at a later point in the opinion the Court said that the words, "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, wherever a subject is taxed in one State, the same must be taxed everywhere throughout the United States and at the same rate.

Mr. HILL. What is the subject involved in this proposed legislation?

Mr. DONWORTH. That we have before the committee?

Mr. HILL. Yes; is it a property relationship between the wife and husband, or is it a particular kind of property sought to be taxed?

Mr. DONWORTH. Before answering that directly, let me make this comment as illustrative. Is there any essential difference between management and control when conferred by the mandatory language of a State statute on the one hand and management and control when voluntarily given by a power of attorney on the other? The Supreme Court of Washington says in *Schramm* v. *Steele*, speaking of the Washington statute, that it is no more than a power of attorney with limitations. Now, would it be fair to let a husband in New York have a power of attorney from his wife to manage and control her property and not be treated as the owner of its income, and at the same time to make the opposite rule in Washington, where the power of attorney comes from the statute?

Coming directly to the question propounded by Mr. Hill, the proposition of the pending bill utterly lacks uniformity, because it singles out eight States. It enacts taxing provisions for a marital community, but there are only 8 States that have that, because the words "marital community" are liable to be construed in accordance with the intent of the author of the bill, namely, the marriage status in the 8 States. No one here seems to question that that is what is in contemplation. It would single out the marriage relation of 8 States and endeavor to tax in those 8 States something not taxed in the other 40. It would base the income tax in eight States on management and control, which the Supreme Court of the United States says is an immaterial circumstance having nothing to do with the question of ownership. In the first place, we say such a proposal is not right; in the second place, we say it is not constitutional; in the third place, we say it would not accomplish a good or beneficent result if the first two points were overridden.

The counsel and the representatives of the Treasury who have addressed the committee, with the exception of Miss Carloss, I think, have stated that they do not claim any familiarity with the local statutes. My recollection is that Mr. Monarch said—and I hope I do not unfairly remember his statement—that while he was not familiar with the local community-property laws, he understood, in a general way, that the husband's management and control under community-property laws was so unfettered as really to amount to a property interest. We have shown what those laws are and how serious the fettering is. Further, I want to say that every opinion that has come from the Attorney General's office, every written opinion, relating to this subject—and they began in 1920, and there have been several—all say that in levying an income tax ownership is the criterion, and they all further say that the question who owns community property in community-property States is a question that must be decided by the statutes and local decisions in those respective States. I think I can point out later that the Supreme Court of the United States has uniformly recognized that principle.

Now, when you have mathematical computations based on the product of a constant and a variable, of course you will get variable results. Where you have one constant, namely, the taxing act of the United States prescribing a general rule uniform in its language, and 48 variables, namely, the State laws supreme in defining property rights of ownership, you are bound to have 48 variable results. It is inevitable. The only way to avoid those 48 variables is to amend the Constitution of the United States and let Congress define all property rights, including the effect of the marriage relation; nobody advocates that.

In the case of Florida against Mellon, when Mr. Mellon was Secretary of the Treasury, Florida brought suit against him in reference to the inheritance tax. It claimed that the inheritance tax was unfair to Florida. That is the case of *Florida* v. *Mellon* (273 U.S. 12), decided in January 1927. The Supreme Court of the United States said in throwing Florida out of court, that acts of Congress must be uniform in their operation, from the standpoint of the United States, the Federal Government, and you cannot use the local statutes of a State to spell out lack of uniformity simply because a uniform act operating upon the various local situations has a different application in different States. It is a good deal like the sun. The sun shines equally on all, but you cannot have equal shadows when there are 48 objects standing out in the sunshine unless those 48 objects are all of the same height, width, and shape.

Now, if I can get this idea over into the minds of the committee, there is bound to be some inequality in the application of every Federal law that operates on things that the Federal Constitution leaves within the powers of the States. This inequality was originally bargained for at Philadelphia in 1787. It was the price then paid for our Federal Union. It is an inequality that was again accepted when the citizens of populous States said, from 1895 to 1913, "If you will let us out of this necessity of paying an income tax according to population, we will accept the local laws of each State as the basis of ownership. How unfair now to attempt to impose an income tax which in eight particular States would depart from the test of ownership as defined by the laws of those States and try to force some assumed basis of management and control. Our community-property laws are so ingrained in our States that we cannot change them. I

cannot regard as serious the suggestion that other States adopt our system. The gentleman from Wisconsin on the committee made a suggestion along this line saying that if this Treadway bill is not constitutional the only remedy is for the other 40 States to adopt the community-property system. They will never do it, for many reasons. Of course, it is impossible to instill into a grown man the habits of thought that another has acquired through a long life beginning with infancy. If I said to a man in New York, "Here is what the Washington law is", and if I read Schram against Steele, and if I told him the other things that I have said here today, and if I said, "I believe in some cases you would pay less taxes in New York, some of the married people would pay less taxes, if they were to adopt the community-property system." He would ask, in astonishment, "Do you mean to say that when my wife dies, if I am only 40 or 50 years old, I have to divide everything I have acquired since marriage with her children, or the person she gives her property to by will?" And I say, "Yes; you must." He would respond, indignantly, "I would not think of it. I give to my wife a lot and make it hers, but I want a real management and control over my accumulations, not the so-called 'management and control of your State.'"

On what theory, by what right, can anyone say that our system, which we believe is founded upon justice and which works with satisfaction in our State, is to be treated with less finality and sanctity than the systems of other States?

Every married man who succeeds, either moderately or in a high degree, in accumulating property, makes provision for his wife. In Washington, we cannot go into partnership with our wives. The Supreme Court of Washington says that the statutory partnership is the only partnership that can be formed between husband and wife. The case of *Board of Trade* v. *Hayden* (4 Wash. 263), decided that proposition. Now, in New York and in Illinois, and in the other 40 States, what does a man do? As his success progresses he transfers property to his wife, as a voluntary act. He gives her as much or as little as, in his judgment, he wants to give, and as soon as he gives that to her, the United States immediately recognizes her title; why not? It is a good title, and the husband no longer has anything to do with the income, even though the wife says, "You know all about stocks and bonds; you know all about this corner lot with the building on it; you handle it for me." And he handles it, with full management and control. Nevertheless, it is hers. Now in Washington we do not do that because the wife is 50–50 with the husband all the time. We cannot take her half away from her. If we make a transmutation, if property is sold, the product is still 50–50 hers. If we undertake to defraud her, we can be stopped by a court proceeding. We say this community system is a substitute for what in other States men do voluntarily, and because in other States voluntary transfers to the wife do not result in uniting the income to the husband's. That should not be done in our States.

Another thing: Do not think that if this law were enacted and were held constitutional the wife would be relieved from a tax and the husband would pay it; no. The husband would pay it out of the community property, and he would pay more tax than he pays

now. I doubt if he would pay any more in proportion to the accumulations of the spouses than the man in New York and Massachusetts pays now, for the reason I have just mentioned. The voluntary transfer gives the wife in those States something that everybody says, of course, is hers, and it is taxed to her. It is not proposed here to add that to the husband's. But this bill proposes to add the wife's half of the community income to the husband's half of that income and also to his separate income and to tax and surtax it accordingly. When proponents say that there is an unfair advantage to us under the present law they mean, analyzed, that we get a benefit from the divided title of this property which we would not get if the two community incomes were added together. Of course, adding two incomes together makes a larger tax. But they forget that they are not proposing to apply the same principle in the 40 other States wherever the wife has been given property by her husband. They are going to let that go under the existing law. They overlook the fact they make the same arrangement voluntarily by transfers to the wife and they propose to continue the exclusion of that income from the computation of the husband's tax. In other words, the privilege that they want to take away from us is a privilege that the laws of the other States enable citizens there to accomplish in another way. What rich man is there, if he is worth a million, that has not transferred to his wife various large amounts, given to his wife $100,000, $200,000, or even $500,000 of his property as hers, or put it in trust for her? The proposed bill leaves the taxation of the income of that property just as it has been.

When we get into this question of disturbing the systems of different States and saying there is an advantage here or there and that this or that State should change its system or suffer some penalty for not doing so, I am reminded of the historical incident in the Continental Congress which the committee very likely will recall. In the early days of the enthusiasm for the French alliance, coupled with detestation of British tyranny, some enthusiastic Member of Congress offered a resolution that French be declared the official language of the United States. Another Member with a greater sense of humor offered an amendment. He said:

> I propose that we retain English as the official language of the United States and compel the people of England to learn French or Greek.

A few moments for analyzing some of these cases cited by the proponents of the bill. The time is passing and I will not have time to read them all. I have before me excerpts from the opinions in these cases, cited by counsel in opposition to our position here. The first is *Reineke* v. *Smith* (289 U.S. 172). That was the case where a man owning property made a trust with certain powers of revocation. The act of Congress said that the grantor in such a trust, if he reserved certain powers, should be deemed still the owner. I am reminded that when I was a young man living down in Maine, I lived in the town of Machias, and there was a citizen of our town who was going to move to Cherryfield. He said, "I will beat the town of Machias and the other town out of 1 year's taxes." The towns there have jurisdiction to do the assessing and they assess property to the owner in the place where he resides on the 1st of April. So, on March 31, Smith of Machias left town, packed up his household

goods, sold out everything he did not want to take, and with his family he drove midway to Cherryfield, arriving at the town of Jonesport in the afternoon of March 31. He spent the night of March 31 and all day of April 1 in Jonesport. He left Jonesport about 10 o'clock on the 2d of April, arriving shortly after at the town of Cherryfield. He said, "I cannot be taxed in Machias because I left there for good on March 31; they won't think of taxing me in Jonesport because I was only passing through there on April 1. As far as Cherryfield is concerned, I was not living in there until the 2d of April." His plan failed. They taxed him in Machias and the tax was upheld. The court said that a status once acquired continued until it was completely changed. A partial change of status is not recognized. That is all there is in all of these cases. Why go back in all of these cases to trace out the question of an interest retained by the grantor, the former owner, except to find out who was the owner. In each case they taxed the owner but refused to recognize an incomplete change of ownership.

Further, let us bear this in mind: All those trust cases involved trusts made under the laws of the States. Did anybody question but that the construction of those trusts was a matter of State law, the instruments affecting title? The whole question proceeded on the assumption that State law was the controlling thing. If those trusts had been void under State laws for violation of the rule against perpetuities, or for other reason, the Federal courts would have said the transfers are void. Not only is that true of Reinecke against Smith, but it is true of all these other cases. As Judge Sumners has pointed out, Burnet against Harmel was a case in Texas that did not involve ownership at all. The question there was the definition of the words "capital gain", and the court held that while it would follow the laws of Texas on ownership—that was not disputed—the question of what was a capital gain was a matter for determination by Congress. Ownership remained unqualified, as always, a matter of State laws.

Opponents cite *Burnet* v. *Wells* (289 U.S. 670). That was a case where the grantor assigned shares of stock to a trust company, the income to be used for several things, among others, to pay the premiums on policies of insurance on his own life. The court said that there was no attempt to charge against the taxpayer the whole income of the trust. The deficiency assessment was limited to the part of the income which was to be devoted to keeping the policies alive. The court held that the grantor, the full owner, had retained a substantial interest for himself in devoting money to the payment of premiums on the policies which he had himself taken out on his own life.

In *Burnet* v. *Leininger* (285 U.S. 136), the taxpayer made a private agreement with his wife purporting to make her a partner. The Court said that a change in the members of the partnership could only be effected with the consent of the other partners; that their consent was not asked for or obtained; that the instrument amounted only to this: That the husband in substance agreed to give to his wife an interest in what he should receive out of the partnership. The Treasury uniformly recognizes partnerships in the 40 other States, even when husbands and wives are the partners, as entirely proper and husbands and wives are allowed to divide the income accordingly. That would have been done in Burnet against Leininger if the other partners had been consulted and had consented to enlarge the partnership.

Taft v. *Bowers* (278 U.S. 470): I think Mr. Monarch cited the same case in the lower court, where the title is *Bowers* v. *Taft* (20 Fed. (2d) 561). There, the question was this: Congress enacted an amendment to the income-tax law which was sustained to this effect: That if a man owning property gives it to a donee and the donee later sells it, the cost base for determining the taxable net capital gain shall be not the value at the time the donee accepted it but the cost to the donor. It is another case of finding the owner and tracing through. The Court said that under former decisions the settled doctrine is that the sixteenth amendment confers no power upon Congress to define or tax as income, without apportionment, something which theretofore could not have been properly regarded as income. The statute under which this assessment was made was in effect at the time that the donor gave the property to his daughter—I think the donee was a daughter—and she sold it at a greatly enhanced value. Bear in mind the daughter—if it was the daughter—was the undisputed owner and the tax was assessed against the owner, the daughter, for a capital gain realized by her. The question was, How much capital gain?

The court said that in truth the stock represented only a single investment of capital, that made by the donor, and when, through a sale or conversion the increment was separated therefrom, it became income from that investment in the hands of the respondent subject to taxation according to the very words of the sixteenth amendment; that by requiring the respondent to pay a part into the Public Treasury, Congress deprived her of no right and subjected her to no hardship; that she accepted the gift with knowledge of the statute and as to the property received voluntarily assumed the position of her donor; that when she sold the stock she actually got the original sum invested, plus the entire appreciation and only out of the latter was she called upon to pay the tax demanded. She had the whole sum and the Government said by accepting the gift which had cost her nothing, she had elected to assume the liability of the former owner.

So, also, with *Reinecke* v. *Smith* (289 U.S. 172). This also was a trust, and the question was as to the liability of the grantor in an uncompleted transaction. So, again, quoting the French—I seem to have French on my mind this morning, perhaps as a result of considering certain phases that have come down in some States from old French times—the more it changes, the more it is the same thing. The more you analyze the question who is taxable for income, the more you come back to the question of ownership and nothing else.

When I read the language of this bill which proposes to enact that for certain purposes—vital to us—the property of a marital community shall be considered as the property of the husband and that the income of the marital community shall be considered as the income of the husband, I am reminded of the old conundrum, "How many legs would a dog have if you considered his tail one?" The

answer, "He would have four, because considering it one would not make it one."

Mr. HILL. Before you conclude your statement, I would like to call attention to a suggested amendment by Mr. Monarch, who appeared here from the Department of Justice. He suggested an amendment in the bill before us, on line 5, that we strike out the following language: "property of the marital community shall be considered as the property of and", leaving only as the subject of the proposed tax in the bill income of the marital community. And that that should be considered as the income of the spouses. I would like to get your reaction as to the constitutionality of the bill, if amended as he suggests. Also, do you think it would be constitutional if you put in the statute a provision taxing the salary entirely to the person who earned it in these community-property States?

Mr. DONWORTH. I think that Mr. Monarch made a number of suggestions. I think his first suggestion contemplated striking out certain clauses and then, in addition to that, he handed in to the committee a typewritten suggestion. Have you in mind his verbal amendment to the bill itself or this typewritten suggestion?

Mr. HILL. I want to get your reaction to his suggestion. If he has stated it there in fixed language, perhaps you had better refer to that in making your comments.

Mr. DONWORTH. Mr. Fulbright suggests that the question you would like to have me answer might be stated in another way, along this line: Suppose a bill were offered that either throughout the United States or only in the community-property States would propose to tax salaries to the producer; which did you mean?

Mr. HILL. I had reference to the bill before the committee, and the change in the language which he suggested in this bill now before the committee, H.R. 8396.

Mr. DONWORTH. I do not know whether Mr. Monarch intended the bill, if amended as he suggested, would apply only to the community-property States or to be general. My answer may have to be more or less varied accordingly.

Mr. HILL. I understand that in the bill the language would remain, if his suggestion should be adopted as an amendment, "that for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, income of a marital community shall be considered as the income of the spouse who has the management and control thereof under the law of the jurisdiction in which the marital community exists."

Mr. DONWORTH. And then he would single out salaries for special treatment, you mean?

Mr. HILL. You understand this bill is designed to apply only to the community-property States?

Mr. DONWORTH. Yes, sir.

Mr. HILL. And to the income of the marital community in community-property States?

Mr. DONWORTH. Yes, sir.

Mr. HILL. I take it that it was his intention to confine the subject to incomes in community-property States.

Mr. DONWORTH. On that assumption, then, what do you understand to be his definite amendment?

Mr. HILL. I marked it on the bill when he was before the committee. Here is what the suggested amendment is: Beginning on line 5 of the bill, after the figures "1933", strike out the balance of line 5 and that part of line 6 down to and including the word "and", so that it will read, "that for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, income of a marital community shall be considered as the income of the spouse who has the management and control thereof under the law of the jursdiction in which the marital community exists", and so forth.

Mr. DONWORTH. I understand the point precisely. I think the amendment is immaterial one way or the other. It is, I think, fairly clear that the words proposed to be stricken out, namely, all of line 5 after 1933, down to and including the word "and" in line 6 are put into the bill for the sake of furnishing what we might call a moral background or a legal background to what follows, because, if you are going to tax the income as income of one person, the reasons for it, while possibly desirable, are not material in the result.

All that this stricken-out language means is that because the proponents consider the property of a marital community to be the property of one spouse, therefore they are going to consider the income as the income of one spouse. That is the way I get it. But the community-property system is, of course, a unit. We who have lived under it and like it, although it was adopted 40 years before any Federal income tax was in anybody's mind; it would meet with a 90-percent vote of the men and women in Washington today, regardless of any question of income tax. The Federal income tax is a much more recent thing and had nothing to do with it at all, but we like this just arrangement of marital property rights. There would be a rankling feeling in these 8 States that would last a long time if they thought that the Representatives of those States were outvoted by the Representatives of the other 40 States in trying to engraft some other relationship in these States for the purpose of Federal taxation, different from what we have got. I do not think the striking out of that would affect anything I have said.

Mr. HILL. Regardless of the reference here to the income of the marital community, do you think it would be constitutional for Congress to enact a provision taxing the salary entirely to the person who earned it, regardless of what the State law says as to ownership of that salary?

Mr. DONWORTH. My whole argument, I think, leads to the other conclusion. Let me also, as long as you have reminded me of it, refer to the Hoeper case. Let us remember this: In Wisconsin it was a State tax, a local State tax, and this is the reason why the distinction our opponents are trying to draw has no application. Read the dissent in the Hoeper case. Justice Holmes and a few others dissented, and there was pretty good logical ground for their dissent. Why? They said at common law there is no doubt this whole thing could be taxed to the husband; he owned it, and the power that laid the tax had power to go back to the common law, if it wanted to, on domestic relations, and that is all there is in the dissent. Three able judges dissented; they did, but only on this ground. That if the tax had been imposed when the first family of

settlers arrived in Wisconsin, it would have been constitutional because the same authority that levied the tax had the absolute control over domestic relations originally, the titles, definitions of titles, ownership, and everything else.

Mr. HILL. That was statutory authority.

Mr. DONWORTH. Yes; statutory authority; it was a State tax and Justice Holmes said what they have done here is to amend all these new modern privileges of the wife and then cut back to the common law, and they have said that the wife can do this, that, and the other thing, and so forth, but for taxing purposes we reenact the common law on this one point. That is what he said. Now, his dissent does not apply at all here. Does anybody claim that the United States can reestablish the domestic relations, going back to the common law, in any of these States? There is no common law for the United States. We give full effect to the majority and the minority here.

Answering your question, there is only one test of liability for an income tax of the United States in these cases I have cited. That test is ownership. It is still the old direct tax, and you can tax income to nobody but the owner or the one who has been the owner and who has tried to rid himself of liability by a partially completed transaction. That is the only case they recognize where the present owner is not responsible for the tax.

Mr. HILL. That is based on the fact that in the community-property States the salary owned by either spouse is the community income and owned in equal parts by both.

Mr. DONWORTH. It is, and look at the injustice, taking the case where the husband is sick and his wife runs the business, and the husband may have inherited $50,000 as separate property. The wife runs this business; she earns all the money; they are going to take the income she earns and add it to the separate income of the husband. When you say it is the property of the husband, then you add his separate property to it and this community stands the added surtax of the wife's earnings on top of those of the husband. You know, in the State of Washington, when the wife is injured in an automobile or any other kind of an accident, that the recovery for the impairment of her health and the ruin of her body is community property.

Mr. SHALLENBERGER. Before leaving Mr. Hill's question, as I understand it, the salary, no matter how much it is, the wife under the law is entitled to her half. Could you, under the Constitution, pass a law that would give that entirely to the husband, or has she a constitutional right which you cannot take away?

Mr. DONWORTH. As to the future, we could. All the accumulations of the past belong one half to the wife.

Mr. SHALLENBERGER. That can be modified the same as you say we can modify many other things, which were not the original ideas of the community-property laws.

Mr. DONWORTH. But the question of salaries is so intimately tied up with the whole situation that I do not think it would be possible to contemplate it.

Mr. FULBRIGHT. Might I interpolate at this juncture that in Texas they could not do it for the future. The legislature undertook to pass an act attempting to do that, and it was declared unconstitutional.

Mr. HILL. You have a State constitutional provision prohibiting it?

Mr. FULBRIGHT. Yes.

Mr. DONWORTH. I may leave this thought; in some of the remarks made early in this hearing the question of salaries is mixed up with everything else as if it were all alike. In certain cases there is probably a temporary advantage from the division of salaries, notwithstanding the fact if the wife dies before the salary is collected, or dies while it is in the bank, the husband has to give 50 percent of that unspent salary to her children or her legatees, and it is only in the event that he lives out the year and collects it and probably spends it that there is any advantage even on salaries. But I want to say this very positively, that an analysis of the whole situation will show, I think, that it is a very partial picture, to take the quesion of a man's salary and compare it to the New York or some other noncommunity property State case, because the rest of the picture comes in too. This bill proposes to create what we call an artificial situation, not in law at all, by any authority that has a right to enact a law on the subject, because with all respect I do say that this question of salaries is all mixed up in one general scrambling, and if you say a man in Washington must report his whole salary the same as he does in New York, let us file interrogatories, as we say, to the New York man.

Question. How much salary do you get?

Answer. Oh, $100,000.

Question. Have you transferred any property to your wife?

Answer. Yes; I have.

Question. How much have you transferred?

Answer. $200,000.

Question. Do you add the income from that to your income?

Answer. No; I do not.

Of course, he does not; and you all come back to the question of the unfairness of taking a particular thing and pointing that out as the decisive and determining thing. The community-property system is eminently fair; it was adopted 40 years before a Federal income tax was thought of, without any idea whatever of evading anything; and we say we should not be treated like Cinderellas. We adopted a system that is more time-honored than the barbarous system of the common law that the 40 States every few years depart from more and more to try to get into a just situation. We adopted the community-property system 40 years before a Federal income tax was thought of, and we ask that we be treated with justice. I thank you.

Mr. SHALLENBERGER. Thank you very much.

Mr. FREAR. I have not had the privilege of hearing what you have said, but I understand from my colleagues that you have made a very excellent presentation.

Mr. DONWORTH. Thank you.

Mr. FREAR. I want to ask this question, and this is the one question that is with most of us; that is, those of us who are connected with the 40 States. It is not just for one who receives a salary in any of the 40 States to have to pay more out of that salary to the Federal Government than the one who resides in the community States. Take, for illustration, we will say, that my salary is $10,000, which it is not, but we will assume that it is.

Mr. DONWORTH. It will be soon.

Mr. FREAR. And the representative from the community-property State has the same salary, and yet I pay $180 more in taxes to the Federal Government, notwithstanding that the two salaries are the same. Now, the question arises, How can that be adjusted?—because, on the face of it, it is unfair and unjust. There may be other questions involved, but would the other 40 States have to adopt the community-property laws to escape that situation, or what would be your suggestion? I do not want to put an unfair question.

Mr. DONWORTH. I welcome the question.

Mr. FREAR. We are all interested in the subject.

Mr. DONWORTH. I welcome the question; it is germane and entirely proper. I have been answering that question for the last hour and a half, Mr. Frear, and it would be a repetition of my argument to answer it completely.

Mr. FREAR. I would not ask you to do anything like that. It seems to me that it is manifestly unfair, on the face of it, that I should pay $180 more to the Federal Government than my colleague from the community State who receives the same salary.

Mr. DONWORTH. Will you permit me to make a further observation?

Mr. FREAR. Yes; I simply give that as an illustration.

Mr. DONWORTH. I thoroughly sympathize with the point of view. As I stated to the gentlemen of the committee before your arrival, I began the practice of law in the State of Maine and practiced there several years and acquired a reasonable familiarity with the other point of view. You take the item of salary as the only thing involved, and you believe there is an advantage to the citizen of the community-property State. I do not think that there is any real advantage to the citizen of the community-property States as a whole, by and large, and on the average, in paying his tax in the community-property system.

Mr. FREAR. Let us see; the testimony of the lady who was here yesterday was that in the State of Texas, for instance, the husband has power to transfer property and necessarily or naturally there occurs an assumption not only of control but of individual ownership, although the title is vested in the wife, under the law. Would it extend beyond salaries in cases of that kind, where that power existed?

Mr. DONWORTH. I would not have you feel that I am not entirely willing to be questioned; I like to have the questions put and I like to answer them, but we are reaching the adjournment hour and I feel that I ought to make my answer short. The injustice of this bill, for one thing—and it is full of injustices—is that in order to accomplish what you have in mind it accomplishes a great deal more. You will understand, of course, that under the community-property system, there are three kinds of property: The separate property of the wife, the separate property of the husband, and the community property. While theoretically this bill does not touch the separate property income of either one, it does touch it vitally.

Mr. FREAR. They tried to touch it under the Wisconsin law and they could not.

Mr. DONWORTH. Yes; and I believe the same constitutional point applies here and forbids touching it. But aside from that, and considering the question of fairness, I will show you how the proponents of this bill are trying to touch it. When we make our returns they come under three heads; the wife says, "I got from my father $10,000; here is my income." The husband says, "I got from my father, or I had when I married—the most of my success was before I married—I had $200,000; since then—we have been 20 years together, and we have done very well—we have accumulated some more." This bill proposes to take this income of the community property and salaries, or what not, and by calling it the individual income of the husband, is going to consider it as his individual income and tax and surtax it accordingly. That is the purpose of it, and the community property will pay that tax. The wife will pay not only enough to cover the tax on her half of the community income, but she will find her half of the community income added to her husband's separate income and surtaxed a high aggregate. She has no interest in her husband's separate income, but it will measure her tax.

Mr. FREAR. Do you mean to say she will contribute part of that, providing all the money is turned over to her in the business?

Mr. DONWORTH. No; the turning over is not vital. The minute she dies, the husband has to divide the community property with her children; not his, and with her legatees or devisees, if she has made a will; and he will find at once that he has not only lost his wife, but he has lost half of his property. This whole thing must be viewed as a whole. The wife is earning money herself. I do not know what proportion of wives in our State work in one way or another, but they do earn money and they often work outside the home.

Mr. FREAR. Do you mean she is drawing a salary or wages?

Mr. DONWORTH. Yes; or working in a store owned by the two spouses.

Mr. FREAR. Would you say that of 10 percent of the married couples the wife is doing that?

Mr. DONWORTH. It would be hard to form an estimate. But whatever she does, she does not, as in other States, receive capital gifts from her husband. The law creates a half interest in her of post-marriage earnings instead of leaving the provision to the husband as in other States.

Mr. FREAR. I was wondering what proportion of them worked; I had not thought of that before.

Mr. DONWORTH. Not only that, but there are lots of businesses where the wife is in the shop every day, small businesses particularly, enough so it amounts to a difference of $100 or $200, and where the wife works. One of the other injustices of this bill is that it is proposed to take the community-property system and not to ignore it altogether, as Mr. Monarch intimated might be done. The proponents of this bill are going to follow this community-property system up to a certain point and then depart from it. Why are you going to add those two incomes together; not simply salary, but all? Why? Because the law of the State says they belong to both. This law would compel us to add the income of all property acquired after marriage, but will not follow through on the State law.

Mr. FREAR. Excepting the wife's separate property.

Mr. DONWORTH. All acquired after marriage.

Mr. FREAR. All acquired after marriage; yes.

Mr. DONWORTH. You are going to adopt the State definition of what community property is. I beg your pardon; the proponents here are going to take the community-property system; they like it; it is fine up to the point of uniting the two incomes, and when they have them united, although the very law that united them says it is owned 50–50, Congress would be made to say: "No; we will unite it but will add that to the husband's income."

Mr. FREAR. But they do not disturb the property; all they disturb is the control of the income.

Mr. DONWORTH. I do not think that result follows.

Mr. FREAR. Just the same as in the other 40 States. Separate property is just as sacred in the community-property States as it is in the other 40 States.

Mr. DONWORTH. That is something Congress cannot touch.

Mr. FREAR. And would not desire to do so.

Mr. DONWORTH. But when you take money in taxes, you are taking money out of something. I say, to arrive at the amount of the taxes it is proposed to follow the law of the community States to the point of uniting the two incomes; I mean, everything acquired after marriage, and then you superadd this combined income onto the husband's individual tax.

Mr. FREAR. Of course, you feel that this is an injustice, but what is your judgment in regard to letting the case go to the Supreme Court and allowing the Court to decide it? We have nothing to decide here, except to make a recommendation to the full committee.

Mr. DONWORTH. I remember you made that suggestion clearly yesterday. The though is this: By passing the statute along these lines, we could bring into the Treasury from the community-property States a considerable sum of money. The other gentlemen who will follow me will call attention to how much that might bring in. I think it is very very much less than has been suggested here. It is suggested that because the enactment might bring in a considerable sum of money, therefore let us pass it and put it up to the Supreme Court; that is your suggestion?

Mr. FREAR. It would put the States on a parity in reference to certain income on which the Federal tax is levied.

Mr. DONWORTH. I do not think there is any advantage to the community-property States in actual operation as compared to noncommunity-property States.

Mr. FREAR. Then what is the objection to letting it go to the Supreme Court, because the Court is going to take all these elements into consideration?

Mr. DONWORTH. I had not quite finished the thought.

Mr. FREAR. Pardon me.

Mr. DONWORTH. In New York the successful man who has accumulated, we will say, $400,000 or $500,000 after marriage, if he is the right kind of a man and he has a good wife, as the majority of men are and do, he is going to turn over to his wife a considerable sum of money, either direct or in trust. He is not going to wait until he dies, and he does turn over to her perhaps $200,000 in bonds, or he gives her a building, and from that time on she pays the taxes on that and it is not superadded either to his salary or to anything he has got.

Mr. FREAR. What happens now, since the gift tax has been put into effect, in a situation such as that?

Mr. DONWORTH. He can give away $5,000 to each member of the family, and he can give away up to $50,000.

Mr. FREAR. He can do that, but does he do it?

Mr. DONWORTH. He does and has been doing it, as far as my knowledge goes.

Mr. FREAR. The Treasury reports indicate that?

Mr. DONWORTH. The Treasury reports do not indicate the fact, if you get me, When Mrs. John Smith of New York has $200,000 in bonds, assuming they are taxable, given to her by her husband; the reports do not show where she got that $200,000; there is nothing in the statistics of the Treasury Department to show that. It is hers and she pays the tax on it and it is not superadded to the husband's income. In Washingon, instead of the voluntary transfer, the law creates in her this interest from the time the property comes into the marital union.

Mr. FREAR. He can give the additional amount, if he chooses.

Mr. DONWORTH. He does not want to impoverish himself. What I am saying is that in noncommunity States, in the many large voluntary transfers by husbands to wives, there is and long has been a substitute for the community property; what is done by voluntary act is substantially the same thing. There is nothing in the Government reports to show it, and then the advantage that I spoke of in noncommunity States is an advantage not reflected in the Government returns for the reasons I have stated.

Mr. FREAR. Then the proper way to meet that situation is to have the reports bring that information out and indicate exactly what the situation is in New York and other States, so that the Federal Government can reach out and do justice to both. Is that not a fact?

Mr. DONWORTH. If you can get an administerable bill that would go back to the origin of every dollar of property. I have been married to my present wife for 45 years and have been fairly successful, with my wife's help, and I have not given her $1 of capital, because she has as much as I have. If I lived in New York I would have given her quite a large amount of money and she would pay an independent tax on it and these gentlemen of the Treasury, as far as concerns anything shown in the returns, would not know anything about it.

Mr. FREAR. Not under present returns?

Mr. DONWORTH. Or under any other system.

Mr. FREAR. I am trying to see what plan we can devise for the future, which this law is designed to reach.

Mr. HILL. Does Congress have the right to prevent a man from giving away his property if he wants to; has it any power to prevent that?

Mr. DONWORTH. It is unfortunate that Mr. Frear has missed so much of what I have said.

Mr. FREAR. I thought we were going to take up the question of the transfer of this property and determine who was going to pay the tax on it.

Mr. DONWORTH. The opposition to this bill is based on three lines: First, it is unfair; second, it is unconstitutional; and third, it would not accomplish a desirable result. I am afraid that the gentleman from Wisconsin assumes the unfairness to exist simply because if you take salaries as an isolated matter, it would be, but then you should bear in mind that the freedom of gifts, aside from the taxability of it, is unimpaired, and has been exercised in New York and other States tremendously up to date. You are not going to make this community-property bill prospective in fact. Husbands and wives have been accumulating community property in these eight States many years. The income from those past accumulations would be taxed as a unit under this bill. The gentleman from Wisconsin mistakenly thinks this will be prospective.

Mr. FREAR. Let me take another illustration, not confining it to salaries. Here is a man with a business and say he makes $100,000 a year net profits from the business and it is reported. Now, in the community-property States, of course, it is divided evenly between the husband and wife. It is not in the other States unless he makes a transfer to the wife. He pays the income tax in the higher brackets on the whole thing; irrespective of salaries, it is a profit, and it comes in the same category as a salary.

Mr. DONWORTH. There are two reasons; one based on fairness and the other based on the Constitution. On the question of fairness, the husband in our States cannot form a partnership with his wife. The decisions are that the community partnership is the only one allowed. The law has defined the relationship. He cannot give her an interest in the business. In New York he can. If this business has been producing $100,000 a year, he has accumulated a lot and he has taken care of his wife in an appropriate way by the creation of a trust or by transference, in any of the 40 States. We do not do that in Washington because we have lost 50 percent through the 50-percent reservation in the wife. As a matter of fact, that is a very small circumstance compared with the corresponding voluntary acts in other States.

Mr. FREAR. I was assuming he was in business with someone else or individually and that his wife was not a partner.

Mr. DONWORTH. But in New York she can be made a partner.

Mr. FREAR. But, of course, that percentage is quite small of husbands and wives as partners in New York.

Mr. DONWORTH. I would say this: If it is a successful business, the wife is given an interest or is made donee of substantial properties that furnish her an income. I have treated that subject rather extensively. I hope you will do me the honor of reading my remarks.

Mr. FREAR. It will be interesting to do so.

Mr. DONWORTH. It has been definitely decided by the Supreme Court that the sixteenth amendment did not change the meaning of the word "income" or the meaning of "income tax." It simply released Congress from the necessity of apportioning this tax among the people of the various States.

Mr. FREAR. We have here attorneys who believe, or find reason to believe, that the Supreme Court has not passed upon this issue. If you feel that the Court is going to hold this unconstitutional, what is the objection to adopting the suggestion of these gentlemen who represent the governmental agencies.

Mr. DONWORTH. The gentleman of the committee have heard what those lawyers have said.

Mr. HILL. I suggest, Mr. Frear, that they have not expressed any different view from the statement just made.

Mr. FREAR. The judge has stated that it is unconstitutional.

Mr. HILL. I understood his statement, that you interrupted him on, to be that the sixteenth amendment did not vary the meaning of income and that it did not vary the meaning of income tax, but simply relieved Congress of the necessity, in levying income taxes, of apportioning it. I think everybody is agreed on that.

Mr. DONWORTH. I understood the gentlemen from the Treasury Department and the Department of Justice to express some hope; I think that is all.

Mr. FREAR. There were several dissenting opinions among the many decisions of very eminent lawyers.

Mr. DONWORTH. Not on any one of those points, I think.

Mr. FREAR. I do not attempt to distinguish them myself; I leave the Court to do that.

Mr. DONWORTH. Let me say what I think the other gentlemen have said, with apologies. I do not think anyone thinks that the Supreme Court of the United States has ever decided that an income tax under the sixteenth amendment can be levied on anybody but an owner.

Mr. FREAR. That is the attempt in this bill?

Mr. DONWORTH. To levy it on someone not the owner.

Mr. FREAR. That is the attempt, I admit that. That is because of the community-property definition.

Mr. DONWORTH. I think it will be unanimously conceded, as I say, that the Federal income tax can only be assessed against the owner. I think it will be unanimously conceded that in ascertaining ownership the laws of the States have the absolute and unqualified domination to make the decision.

Mr. FREAR. Would that not be an open question? Is not that the question of control and enjoyment and all these other questions which have been presented by the attorneys?

Mr. DONWORTH. I think that ownership is the test, and, secondly, the State laws and State decisions have sole sovereignty on that question. I think where they have expressed the hope is in this: They have expressed the hope that if this bill were enacted the Supreme Court would hold that management and control in community-property States is the equivalent of ownership. I think that is all they hope.

Mr. FREAR. Predicated upon the same basis as in other States?

Mr. DONWORTH. That is their hope, but I think that the decisions of the United States Supreme Court on that subject are so clear that it would be unjust for 40 States to outvote 8 and subject them to the defense against this departure from long-established methods approved by the Supreme Court. It would be very expensive; we would have to start suits and carry them from the district courts all the way up, and it takes time and it means expense, not only the expense of the lawyers but of accountants, in the meantime to

get up reports and make demands. I do not think it is fair, unless they have something stronger than hope; unless something far greater is involved than is involved in this case, when you get the definite figures.

Mr. FREAR. They do not concede that it is just a hope, but admitting it is, and that you are right on it, in view of the fact that it will be decided by the Supreme Court, not on the basis of 40 and 8 States, but by 9 learned judges; if you are confident of your position, what is the danger of submitting the question to the court, unless an injustice occurs, and an injustice does occur under the present system.

Mr. DONWORTH. Of course our views are to the contrary. I presume, if such a law were passed, I would be employed again. I was counsel in *Poe* v. *Seaborn*.

Mr. FREAR. I would say that they were well represented before the court.

Mr. DONWORTH. Thank you. It would involve all these eight States in a host of difficulties, under duplicate returns, until that matter was decided, the employment of accountants and of lawyers, and I do not believe there is enough hope in this to warrant you in putting that burden upon us.

Mr. FREAR. It would only be necessary to appeal one or two cases.

Mr. DONWORTH. Everyone must protect his rights by protesting.

Mr. FREAR. They can protect their rights by protesting but they would not need to take it up to the Supreme Court.

Mr. DONWORTH. They must all pass the hat.

Mr. FREAR. You would be generous in a case like that and it would not involve much passing of the hat.

Mr. DONWORTH. May I say this: There is something more to the honorable position that you occupy, and to the honorable position that your colleagues in the House and in the other House occupy. There is much more in your position than the mere passing of questions up to the Supreme Court of the United States. You have a responsibility of your own.

Mr. FREAR. If you sat here on this commiteee and heard the questions discussed of evasions and of discrimination, you might change your view. We do the best we can in trying to solve these problems, but we are human like all the others. Our duty is to try to protect the Treasury so far as we can.

Mr. DONWORTH. We are not resting our position solely on unconstitutionality, and in my remarks today I have not followed any particular order. In addition to unconstitutionality, I have tried to point out where this law would be unfair to us, grossly unfair, and where it would not accomplish what seems to be in mind, and so, considering your own obligations as public officials, holding very responsible positions under the Federal Constitution, I submit that on the whole case as it will be presented before the hearing concludes, you will come to the conclusion that the unfairness of passing this bill, as well as the impracticability in application should lead you to make an adverse report.

Mr. FREAR. Would you make any suggestions of amendment to the bill in its present form, and in taking it up to the court? I can see that one objection which you made may have a basis; that is, giving authority to the Treasury Department so they could require every gift to a wife to be recorded so they could determine that situation.

Mr. DONWORTH. You see, the question of unconstitutionality runs into the question of unfairness. In order to make this bill constitutional, I think you would have to emasculate it, and in the endeavor to bring in what is necessary to protect us in fairness along the lines I have indicated, you would have to put in administrative features utterly impracticable.

Mr. FREAR. That will be left up to the Treasury Department.

Mr. SHALLENBERGER. We thank you very much.

Mr. FREAR. I thank you very much for the information. I am sorry that I could not get up to the meeting before.

Mr. SHALLENBERGER. We will adjourn until 10 o'clock tomorrow morning.

(Thereupon, at 12:40 p.m., the committee adjourned until tomorrow, May 5, 1934, at 10 a.m.)

COMMUNITY PROPERTY INCOME

SATURDAY, MAY 5, 1934

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE OF THE COMMITTEE ON WAYS AND MEANS,
Washington, D.C.

The subcommittee met at 10 a.m., Hon. Ashton C. Shallenberger (chairman) presiding.

Mr. SHALLENBERGER. Gentlemen, the committee will be in order. The first witness to appear will be Mr. Eustis Myres, of Dallas, Tex.

STATEMENT OF EUSTIS MYRES, DALLAS, TEX.

Mr. SHALLENBERGER. Please state your name and whom you represent.

Mr. MYRES. Mr. Chairman and gentlemen of the committee, my name is Eustis Myres, of Dallas, Tex., and I am representing the folks there.

Mr. HILL. Representing whom?

Mr. MYRES. The folks there, and also the Dallas Chamber of Commerce. I represent the taxpayers down there.

I will be very brief in my remarks and they will be directed to the historical basis of the community-property system in Texas. I am rather at a disadvantage in following Mr. Sumners and Judge Donworth before you, and I trust that you gentlemen will bear with me. We have two very distinguished gentlemen from Texas who will present the main points in this case.

I would like to point out to the committee the provisions of the constitution of the republic of Texas and of the State of Texas and call to the attention of the committee the pertinent facts as affect Texas in this community-property situation. Texas was a republic; it was a part of Mexico, and by the fight for independence, as the United States had their fight against Mexico, in 1836 the constitution of the republic of Texas was adopted.

This community-property matter has come into Texas through the Spanish and French laws; it had become a part of the Texas law. On March 17, 1836, there was adopted the following provision of the Constitution of the Republic of Texas:

> That inconvenience may arise from the adoption of this constitution and it is declared by this convention that all laws now in force in Texas and not inconsistent with this constitution shall remain in full force until declared void, repealed, altered, or expired by their own limitation.

That was back about 98 years ago.

In 1845, Texas, through a treaty and resolution of the Federal Congress, became a part of the Federal Union, a State of the United States. Article VII, section 19, of the constitution of the State of

Texas, particularly covering the matters of the rights of the husband and the wife, read as follows:

> All property, both real and personal, of the wife owned or claimed by her before marriage and that acquired afterwards, by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband.

That was provided by the State in convention on August 27, 1845.

The joint resolution of the Congress of the United States on March 1, 1845, approved the constitution of the State of Texas and its laws. Section 1 of that resolution read as follows:

> Said State to be formed subject to the adjustment by this Government of all questions of boundary that may arise with other governments and the constitution, with proper evidence of its adoption by the people of Texas, shall be transmitted by the President of the United States to be laid before Congress for final action on or before the 1st day of January 1846.

In 1876 the constitution of Texas was further revised, but the same provision as quoted above, article VII, section 19, of the constitution of the State of Texas was adopted and approved.

We feel in Texas that we are in a peculiar position in this matter of community property. We became a republic, a sovereign state; we had our own system of laws. When the time came that we agreed to become a part of the United States, it was recognized by the United States that the Republic of Texas had certain rights. There was no purchase in connection with the acquisition of Texas. There was no money put out by the United States for the acquisition of Texas, as happened in the Louisiana Purchase and in connection with the other States. We came in and we brought with us our basic laws, our constitution, and our rights were retained and recognized at the time.

Now, since that time, and particularly on April 4, 1917, the Legislature of Texas attempted to make some changes in our laws affecting community property. There was one provision adopted to the effect that the rents and the revenues from the husband's separate property were to be classified as his separate estate and that the rents and revenues from the wife's separate property were to be her separate estate. That matter went into the Supreme Court of Texas in the case of Arnold versus Leonard (114 Tex. 535), and the Supreme Court of Texas held that that provision was unconstitutional as attempting to restrict the rights of the wife or to broaden them in any way. In the case of Arnold versus Leonard it was held that—

> The only separate property of the wife which is not considered as community property is the increase of lands. Increase of lands means not crops, nor rents, nor other income produced from such lands, but physical accretion to such lands or their appreciation in price when sold.

This matter has been considered in Texas from time to time—this question of community property. While it has been pointed out that we might have some advantages, still, as in this act of the legislature in 1917, when an attempt was made to change our laws, it has been found impossible to do so.

Mr. Hill. It is impossible to do that in Texas by State legislation, in the absence of a constitutional amendment.

Mr. Myres. Yes, sir. Just there, I have in mind a remark made by Mr. Frear, of your committee, as to what it might mean to the other States in changing their laws and adopting the community-property basis. It is not so advantageous to us at all. In fact, when you go in to consider it, we have certain disadvantages which the gentlemen of the other States are exempted from. In Texas, if one should acquire a considerable amount of property, his wife might, that year, or the next year, sue him for divorce. We have no grounds for alimony down there, but with this present vested interest the wife can sue for divorce or bring a proper legal action while the suit is pending to tie up all of the property, and on separation acquire one half of it. That is not true in the other 40 States. I think it is probably true in the eight community-property States, but it is not true in the others.

Mr. Shallenberger. Upon that point, do you mean to say that when the wife sues for divorce and it is granted, the division of property is made; that under your laws she automatically receives one half; or does she have to make any showing as to that?

Mr. Myres. No, sir. Under the laws of Texas she receives one half of the community.

Mr. Shallenberger. And they do not have to have any adjustment of it?

Mr. Myres. No; and we could not get away from it except where the equities require a different distribution by the court under article 4638.

Mr. Shallenberger. It is a settled rule of law there?

Mr. Myres. Yes, sir. The other points to be covered will be taken care of by Mr. Hutcheson and Mr. Fulbright for the people of the State of Texas. I thank you gentlemen and appreciate your courtesy.

Mr. Shallenberger. We thank you very much for your statement.

STATEMENT OF CHARLES E. DUNBAR, JR., NEW ORLEANS, LA., REPRESENTING THE LOUISIANA COMMUNITY PROPERTY TAXPAYERS' COMMITTEE

Mr. Shallenberger. The next witness is Mr. Charles E. Dunbar, Jr., of New Orleans. Mr. Dunbar, we will be glad to hear from you.

Mr. Dunbar. My name is Charles E. Dunbar, Jr.; I represent the Louisiana Citizens' Committee of Taxpayers.

Mr. Shallenberger. Is that a permanent organization?

Mr. Dunbar. Well, it has been permanent off and on ever since we have had these troubles.

Mr. Shallenberger. It is not of recent origin?

Mr. Dunbar. No.

Mr. Hill. May I state here that the committee regrets that Mr. Frear, a member of this committee who, through his questioning of Judge Donworth and others, manifested a very deep interest in certain phases of the discussion taking place, will not be present this morning, apparently, to hear Mr. Dunbar of Louisiana, on the subjects which, I understand, will touch directly upon the questions propounded by Mr. Frear.

Mr. Shallenberger. That is to be regretted.

Mr. DUNBAR. My learned colleagues have discussed so thoroughly the constitutional aspects of this question that I intend to devote myself entirely to a discussion of the equities of the situation. I hope to be able to demonstrate to your committee that the proposed bill is unfair, inequitable, and discriminatory, and should not be adopted by Congress, irrespective of any question as to whether the legislation might or might not be sustained by the Supreme Court of the United States. I say this, of course, with the reservation that my opinion is in accord with the opinion that has been expressed by my learned colleagues with reference to the constitutional aspects of the bill.

Mr. HILL. You are an attorney?

Mr. DUNBAR. Yes. I may say that, jointly, with Monte M. Lemonn, of New Orleans, I handled the case of *Pfaff* v. *Bender* (282 U.S. 129), which is the Louisiana test case, which went to the Supreme Court, and in which a unanimous opinion was given that Louisiana wives have a full half ownership in community property, and that the husband was the managing agent. This case will be put into the record.

The difficulty about discussing community property is that on the surface there is an apparent inequity and an apparent discrimination, because we are inclined to think only of results and do not analyze the facts and conditions from which the results flow. I am going to try to use the language of the street in illustrating this. Congress is looking at this as a practical matter, and I feel they are entitled to have it discussed in a pratical way. I am not going to quote authorities, but with the permission of the committee I am going to file a short memorandum containing citations of authorities and statutes in support of the statements I am making here today.

There seems to be a general feeling in noncommunity-property States that the community-property system is a " theory ", a " fiction ", some legislative fiat, which results in our making a different income-tax return and avoiding certain surtaxes, as distinguished from noncommunity States. I want to say that the community partnership, as created by law, is a real, substantial partnership, more analogous to commercial partnerships, as known to the common law, than any other legal status, and that, as a result of that partnership, the wife has certain practical substantial rights and the husband has certain burdens, and limitations, and restrictions that are clear, and they do not exist in any noncommunity-property State. If that is true, we are not getting any advantage; we are being treated differently because we are different.

Now, the first phase of the community system I want to discuss, because there has been some confusion about it, is the question of the husband's right to manage the property by making contracts and conveying property in our State, without the joinder of the wife which some States require. Of course, that is not a difficult thing to explain, and it does not mean dominion, because the husband, when he sells a hundred shares of American Telephone & Telegraph Co. stock that belongs to the community and buys a hundred shares of United States Steel stock, the Steel stock also belongs to the community. He is merely the managing agent; or, if you want to adopt another common-law analogy, he is an agent with a general power of attorney from the wife, given to him by law, with authority to manage with reasonable discretion the community partnership, and this right to manage is similar to the right of a board of directors to manage the property of a corporation. The board of directors of a corporation can buy and sell property and manage the affairs of the corporation, provided they do not use it for their own benefit, and provided they are not fraudulent and provided their mismanagement is not so gross as to warrant the supervision of a court. I propose to show that this is, as a practical matter, similar to the husband's management in Louisiana.

The husband in Louisiana is not only restricted as to gifts of community property and income, but we have an express statute which prohibits him from disposing of the community property in fraud of his wife's rights. The power of our courts of equity is a potential protection to the wife against any misuse or selfish use or private use of the community partnership property by the husband. The husband is a fiduciary; he is an agent; if he attempts to buy an automobile for his mistress, or to spend that money in debauchery, that is a disposition of the community property in violation of the wife's rights and is a fraud on her, just as it would be if the board of directors of a corporation spends the corporation's money for their own private purposes, or if a trustee at common law appropriated for private and selfish purposes the trust property and income. If a trustee in a common-law State has the full power of management of the property, he can sell it, change its form, use his discretion in the investment of trust funds, but he cannot use trust property and income for private purposes.

I want to give practical illustrations in answer to the point referred to by Mr. Frear. I am going to take one practical typical case and eliminate for the moment the wife's separate earnings and profits from her separate business which also fall into the community in Louisiana. It has already been suggested that an amendment might be made to eliminate this particular inequity. I am going to eliminate it temporarily, for the purpose of discussion, to show that the proposed bill would still be unfair, and of course, it would be unconstitutional, even if it is confined to property acquired by the husband during the marriage because it will for Federal Tax purposes treat as the property and income of the husband, property and income which in law and practical fact belongs to the wife. The case I take is a simple case of a husband and wife who, through thrift, have accumulated a business, the balance sheet of which shows it is worth a half million dollars. The wife, we will assume, has not earned anything or contributed financially to the business. The business has been built up with community property but was earned by the husband, physically earned and saved by the husband. Under the law of Louisiana the wife has a present existing half ownership in that business; the husband, as I have already explained, cannot give away that business, at least to the extent of the wife's half interest; he cannot dispose of any part of that business, or dissipate it in fraud of his wife's rights. Further than that, if he is incompetent—and I want to emphasize this—if he is incompetent, or if he mismanages the business, or if he is reckless and a gambler, and our Supreme Court has said that if he has a " speculative disposition ", the wife has under such circumstances, the right in Louisiana to ask for what we call a separa-

tion of property, which involves a dissolution of the community partnership and a liquidation of the community partnership property which is similar to the liquidation of a commercial partnership for mismanagement at common law. Upon a showing to the court that the husband is mismanaging the community partnership property, or is incompetent, or that he is physically incapable, or of a speculative disposition, she can go into court and obtain a separation of property which dissolves the community and removes the husband from management and control; she immediately obtains possession and the administration of her half, and thereafter she has the same rights with respect to her half as she would have in a non-community-property State.

She takes all her property away and the agency of the husband ceases; his half of the property is his but her half is free from any further administration or management on the part of the husband. That is as substantial a right as anyone can have in a partnership, to dissolve the partnership for fraud or mismanagement and revoke the agency, and the Louisiana law gives her these various rights. If the husband is fraudulently disposing of community property a separation will be granted. Please remember he does not have to defraud her and he does not have to spend it in debauchery, to give her this right of separation of property, because even if he is mismanaging the property the court will grant a dissolution of the community partnership and force an accounting.

I want to say at this point that if you have a business with a balance sheet of $500,000, that means you have to borrow, in these times, $250,000 to pay to the wife, or you have to liquidate a concern, which is a very destructive process, if it is an accumulated business. If the husband has a salary—and we have been talking about only the small salaries, we have not been talking about the salaries where there is a large bank account—that salary has to be divided and delivered over in case of a separation of property. Moreover, if the husband has a bank account he cannot give away the wife's half in fraud of his wife's rights and he cannot donate her half in fraud of his wife's rights. I would like to emphasize that a separation of property does not involve a divorce and can be granted while the spouses are living together.

Mr. SHALLENBERGER. On that question of salary distribution——

Mr. DUNBAR (interposing). I am coming to that.

Mr. SHALLENBERGER (continuing). She could not be denied her right in that salary under certain conditions, if it is not expended. If a man has been receiving a large salary and in his spending of that money he has not accounted to her for her half, after he has wasted his salary, does she have any claim thereto?

Mr. DUNBAR. Of course, any money spent for the upkeep of the family and children is considered a legitimate community expense. If you can show that he has spent it on a mistress or in taking a trip to Europe with his mistress, he is accountable for it in connection with the liquidation of the community partnership when the separation of property is granted.

Mr. SHALLENBERGER. For her half?

Mr. DUNBAR. Yes; for her half. Moreover in Louisiana a husband can only will half of his property, and that is true in practically all the other community States. When he sits down to will his property—and I am still talking not about her side of it, but the property they want to say under this bill is so under the control of the husband that he owns it; he cannot will but half of it. The other half is subject to the testamentary disposition of the wife. She can, if she chooses, will it to her lover, and in the business situation that I have mentioned, if the wife dies the husband, having acquired the $500,000 business which the proposed bill will tax as his property, is compelled to liquidate his $500,000 business, if he cannot adjust the matter with the lawyer of the lover, and give $250,000 to the legatee of the wife. I give this extreme case to show that the wife's ownership is not a fiction but a practical rugged fact.

It is unnecessary for me to repeat as I go along that in the first case I mentioned, in noncommunity States, if you acquire a $500,000 business, you can give it to anybody you please; you can give it to your mistress, or your friend, or your church. If you want to mismanage it, that is your business; if you want to speculate with it, you can speculate with it and the wife has no complaint for the very good reason that it all belongs to the husband. In Louisiana the husband cannot do these things because the wife is the owner of half of the community-partnership property and income.

Mr. HILL. You are talking about non-community-property States?

Mr. DUNBAR. Non-community-property States by way of comparison. The reason the husband can give it away in a non-community-property State is because all of it belongs to him. The reason that he can will it all away, the reason he can speculate and gamble with it or dissipate it, is because it belongs to him. The reason he cannot do any of these things in Louisiana is because half of it does not belong to him but to his wife.

Moreover, in Louisiana, if the wife dies without a will, the heirs of the wife inherit half the property because the wife owns half of the property. In a common-law State or non-community-property State the wife's heirs do not inherit anything because all of the property is owned by the husband. We have a case cited in our brief where the illegitimate children of the wife whom the husband did not know anything about, inherited the wife's half of the community partnership property and income, on the death of the wife, to the exclusion of the husband, and he had to divide the community property and deliver half of it to the illegitimate children of the wife. Of course, in a common-law State or a non-community-property State that would not result, because the property acquired by the husband during marriage all belongs to the husband. And, by the way, in this connection, if the husband happens to be the legatee of the wife, if he happens to be named in her will, in connection with this $500,000 business he has built up, which I mentioned, if she dies, the law is clear that the wife owns half of it and that he inherits it from her. The husband is not only in the unfortunate situation of having lost his wife, but he pays an inheritance tax to both the State and the Federal Government for the privilege of receiving something which the Government says is his in substance. In short, he pays inheritance taxes for receiving this property which the Federal Government says the wife owns, yet at the same time the Treasury Department and the sponsors of

the pending bill say the husband ought to pay an income tax on the same property because it is in substance his.

In Louisiana, if the husband improperly pays his separate obligations, or improves his separate estate with money belonging to the community, his separate estate is accountable to the community and must reimburse the community partnership for the diversion of funds. Of course, in a noncommunity State this would not be possible, because it is his money and the husband can do anything he wants with it, but because in Louisiana the wife has a half interest in it, the husband cannot take money out of the community which is not to be used for the benefit of the community, but is to be used for his private benefit in violation of his duty as an agent and fiduciary.

In Louisiana, if there is a divorce, irrespective of cause, the divorce automatically dissolves the community and results in a liquidation of the community partnership property. The wife immediately gets one half of the liquidated value and the husband gets one half of the liquidated value, and this division of property has no relation to alimony at all. She gets half of the community property because she is the owner, and irrespective of who is at fault. A wife in Louisiana can run away with her lover and at the end of the divorce proceedings she can leave her lawyer behind, and in the example I have given, the husband either has to borrow $250,000 if he does not have it, or liquidate his $500,000 business and give $250,000 to the wife who can live thereafter with her lover in luxury. I do not want to be extreme, but in common-law States the wife could not even get alimony under such circumstances, because being guilty of adultery she would not be entitled to alimony. The reason she gets half in Louisiana is not because she has any merit before the court; it is because the management and control of the husband ceases, and being owner of half of the community partnership property, it is given to her when the partnership is dissolved, no matter what her character is or her guilty activities might have been.

I have illustrated and emphasized the practical aspects of the community partnership law because people talk about the husband in the common law States reporting all of the property acquired by him during marriage as his and in the community property States they say, due to some fiction or theory of half ownership on the part of the wife, he devides it. I wanted to show that the community partnership is real and substantial and not a fiction. It is divided because the wife owns half and she is entitled to divide it. You say you are going to produce uniformity by making us pay taxes according to a system of law that exists in the non-community-property States, but you are not going to, even if you could, restore to our husbands the rights which the husbands in the common-law-property States have with respect to property acquired during marriage. The proposed bill is obviously discriminatory and disregards the practical attributes of ownership resulting from the community system of law.

Judge Donworth said yesterday that he doubted that common-law States would adopt the community system. If community States were getting a tremendous advantage for tax purposes and the community partnership property system was a mere fiction,

every noncommunity property State would have adopted it long before this, and that would have produced uniformity. I submit the reason they have not adopted it is because these so-called "tax benefits," if you can call them benefits, are not wanted because they do not want the practical burdens of the community partnership resulting from the wife's ownership of half of the property acquired by a husband during marriage, and the practical burdens and limitations on the husband's management and the substantial ownership of the wife are the things I have tried to bring out. These practical aspects of ownership, I may say parenthetically, were presented to the Ways and Means Committee in 1924, and when I was discussing the community property of Louisiana, several of the gentlemen said, "I would not have that law in our State; it is a terrible law." I said, "That is a complete answer to our case; if you do not want our law do not complain about the so-called 'tax benefits' that logically result."

Mr. Shallenberger. Have you talked to the women of those States?

Mr. Dunbar. I was trying not to get into the political aspects of it. I understand that women generally think that the community-property States have the most advanced recognition of women's rights in their community systems of all the States. It is based on the theory that the women at home are keeping the home fires going, and that they are actually responsibile for the accumulation of part of the property.

Mr. Shallenberger. The reason I asked the question, several have stated that they do not think that the non-community-property States would avail themselves of what has been suggested as an opportunity to come under the community-property plan. I was wondering if the men were the only ones objecting.

Mr. Dunbar. You will find there have been resolutions passed by national women's organizations advocating the community system, but we feel that we go far enough without dictating to non-community-property States, when we say they do not want our law because it is a substantial thing and involves burdens in relation to property rights and ownership which they do not want to adopt. We merely say that if they do not want the burdens of our system of laws they should not complain about the benefits and try by discriminatory legislation to take them away from us.

This bill and some of the arguments here by the sponsors of the bill are based on the theory that the community system is a fiction and that the husband, for purposes of taxation, should be treated as the owner, even though the wife has been universally recognized by the courts as owner in law and fact. I submit that the husband cannot fairly be treated or considered as the owner when I have shown he cannot give away the wife's half interest if he wants to; he cannot dispose of it in fraud of his wife's rights and for his own pleasure; he loses the administration of it if he is incapable or if he mismanages it. If he is unfortunate enough to lose his wife and he is the legatee, he pays inheritance taxes on the wife's share which comes to him. He cannot pay his separate debts with it; he loses the administration of it if his wife leaves him and runs away with a lover and he has to divorce her; he loses administration of it if his affairs are in disorder or if he is of a speculative disposition. Who

ever heard of an owner who cannot do as he pleases with his property? I am talking about ownership both in law and fact.

The question of dominion and control has been discussed, and I hope I will have an opportunity to analyze these words; they are very confusing; the law books are full of the varied use and meaning of these words. Control and administration, when used with reference to ownership, means a person may do as he pleases with his property. In community-property States the husband is limited and restricted, but he does have certain powers incidental to management. A board of directors has that; a trustee has that; if I have given to me as an agent a general power of attorney, I have that. You can go to Europe and leave me a general power of attorney and I can do as I please with your property, provided it is for your benefit. Benefit is the significant word. When I start using it for my own benefit that is a breach of trust; that is a violation of my fiduciary obligation. I want you to keep that distinction in mind when you talk about control and dominion; it depends on what it is used for. If you are an agent, it must be used for the benefit of your principal. If you are an owner, it can be used for your own selfish benefit and enjoyment.

Mr. SHALLENBERGER. This bill says, "Control and management."

Mr. DUNBAR. I say that because the sponsors of the bill used dominion. Management is the proper word.

Mr. SHALLENBERGER. That is the word in the bill.

Mr. DUNBAR. Management is the proper word and control is unnecessary, because the husband in community States has management and management involves control, because you cannot manage property as an agent or managing partner unless you have a certain amount of power and control. I want to know if I have made that distinction clear.

I am going to pass over very hurriedly some of the things that have been mentioned before. I want to allow time for Mr. Hutcheson, of Texas. With the permission of the committee, I am filing a brief that spells these things out with particularity. I want to show by comparison, again, the discrimination that will exist. I have tried thus far to show we are entitled to the so-called "benefit of separate returns", because there are burdens and substantial property rights which justify the result, and these burdens and substantial property rights do not exist in other States.

At common law, no one has ever suggested taxing the managing partner who makes the return for the commerial partnership. When they are taxed, the individual members who receive their distributive shares return individually and separately their respective shares. The managing partner, as an individual, returns his share, not because he is manager. He does not add the entire partnership income to his individual personal income to fix surtaxes, and yet this bill is designed to compel just that thing in community-partnership States. It is designed to make the managing partner of the community partnership, when he only has a half ownership of the property and income and is a managing partner for his wife, include in his separate return all of the income of the partnership, including that of the wife, for the purpose of Federal taxation, in order to get him into higher surtax brackets.

Take also the analogy of the trustee; the husband has been analogized to a trustee for his wife in some community States. I assume that the committee knows that the trustee pays a tax on the trust estate out of the property of the trust estate and he pays that as manager of the trust estate for the beneficiary, because as trustee and administrator of the trust property it is his duty. His personal liability is merely a penalty liability. They say if you do not pay the tax of the beneficiary you are personally liable as a penalty. It is a personal responsibility by way of penalty, for not having done his duty at the time by paying the Government its tax out of the property that he has the management of. No one has ever suggested that the trustee, because he has the management and control of the trust estate, should add the income of the trust property to his individual, personal income, yet the proposed bill would make a community State husband, who is analogous to a trustee, include his wife's income in his separate individual return.

In the matter of gifts a great deal has been said here on that subject. It has been suggested that now that we have a gift tax, gifts will not be made as much in common-law States, but it has not been pointed out that wealthy people in noncommunity States who have already accumulated over a period of years, large fortunes, have already made donations and other adjustments and this cannot be undone by the gift tax. In the common-law States it has been admitted by the Treasury Department—you cannot get statistics on that, but it is a matter of common knowledge among lawyers, that gifts have been made to wives and children and have been made in the past by most wealthy people for the purpose of enabling them to divide income-tax returns.

In Louisiana the law gives the wife half. I do not like to use the word gift; the law declares she owns half because she earns it. The law creating the marital partnership and giving the wife half of the property and income acquired existed in Louisiana long before the Federal income tax was adopted. You cannot put us on equality with other States by preventing the husband in Louisiana from making a separate return, because they can still make separate returns in other States. As for the gift tax, it has been pointed out that you can still make large gifts, and, more than that, the gift tax was for the purpose of preventing a man from avoiding the inheritance tax. A wealthy man may still find it advisable, and if we had the time we could give practical cases where he could say to his wife, "I am going to give this property to you even though I am going to pay 80 percent of the taxes you will have to pay, because that will be applied against your estate tax, and we are going to get the immediate benefit of separate income-tax returns so it will be more than offset."

In Louisiana and most of the community-property States the husband and wife cannot enter into a partnership or contract with each other at all. Moreover a gift by the husband to the wife is revocable. We come under the analogy of the revocable trust; we probably cannot make a gift that would enable the wife to make a separate return. If the proposed bill is adopted community States cannot arrange, even by gift or partnership agreements, to make separate returns. This confusion and discrimination always results when

you try to change fundamental State property laws by "legislative fiat."

I am going to discuss the wife's earnings separately because there has been a suggestion that they should be treated differently. In Louisiana the community property is made up not only of the husband's accumulations. The wife has a half interest in this property and income on the theory I have explained, and my illustrations have been confined to that situation. The wife's earnings also become community property; if she is a wage earner, if she is in a separate business, for example, a millinery business, the profits of that business are community property. If she takes separate property acquired prior to marriage or that which is left her by will, and speculates on the stock market the profits are community property. Half belongs to the husband and all of the earnings and profits are under his control and management. These are the legal rights.

When a man and his wife are happy there is very little thought of the difference between "mine and thine." It never becomes important until there is a dispute, and it is then the real test arises as to which spouse owns something. Unless there is a dispute there is no real reason for bringing up such questions. This is true in both community and noncommunity States. When there is a difficulty the question of rights become important.

The wife, in Louisiana, can earn $25,000 in a big millinery business and the husband can (if he wants to as manager of the community partnership) tell her not to put that back into the business. He can say, "I want that invested in American Telephone & Telegraph stock," and it has to be done. Although it is income resulting from the wife's separate business activity, it is nevertheless community property and income.

If the bill is passed in its present form the community property husband will have to pay on the income from his separate property and also on the income from the community; he will pay on his individual earnings and will have to add the wife's income from any salaries or any profits from her separate business, and you will accumulate all of this income in one return, when in a case of the same character of income in other States you will treat it in an entirely different manner.

You cannot take the community-property system and isolate it here and there, as Judge Donworth suggested. It is interwoven, and you get out of balance when you attempt to talk about one phase of it.

I am almost through, but I want to say something about Mr. Frear's case. There is no advantage in making separate returns until you get over $6,000. Until you get to the big-salaried man, you do not get the advantage. The problem of difference in tax results between the States does not come up in connection with the income of the large majority in the twilight zone. It is really the man with the large salary who is involved. If he is president of a big corporation and makes $200,000 a year, he does not spend that from hand to mouth. It is in the bank. Mr. Frear is thinking of the man who is not often ahead of the bill collector, when there is no time in which any community-partnership rights of the wife can attach. That is true, whether in a common law or a community-system State, but if there is anything in bank, and by the way, unspent salary is always the basis of investment or accumulation, the minute the Louisiana husband has salary and money in the bank, it is subject to every one of the practical burdens and limitations I have mentioned.

I want to give one more illustration before closing. It illustrates the practical difficulties and unfairness in attempting to disregard fundamental State law. Under the law, and you gentlemen are familiar with the law of conflicts, if a husband accumulates a million dollars in Louisiana and he and his wife decide to move to New York. When they arrive in New York that State recognizes that the community system is a partnership and that the wife has a half interest in the property brought there. The New York courts will say that the Louisiana husband who removes to New York is trustee for half of that property, and the husband and wife can continue to make separate returns. The Treasury Department recognizes this situation and permits separate returns under such circumstances in New York. If this bill passes, a husband and wife living in Louisiana could not make separate returns, but if they moved the community property which the Government says is to be treated as the property of the husband in Louisiana, to New York, they could then make separate returns in New York in the future. You have the amazing result of Congress recognizing the law of New York which recognizes the law of Louisiana and in the next breath saying that the law of Louisiana will not be recognized directly insofar as separate returns of Louisiana husbands and wives are concerned. This will result if by legislative fiat Congress ignores and disregards fundamental property rights in eight States of the Union.

I want to put in the record two illustrative cases; I do not want to read them, but they show how it is possible for a husband in a common-law State to bring about a joint return. In one case the husband wrote a broker and said, "This is a joint account; half of it belongs to my wife." The other is a partnership case which illustrates that it makes no difference in a noncommunity State, if you have a serious contract, whether it was entered into for the purpose of making separate returns or not. It is a question of whether it was bona fide. Your motives are immaterial. With the permission of the committee I would like to file a memorandum brief which covers the points I have made here and these two cases that further illustrate the discrimination that will result from the adoption of the proposed bill.

I want to say in conclusion that Congress—and I am still talking about equity—has twice considered this matter before, once in 1921 and again in 1924. In 1924, very patiently and very carefully, the Ways and Means Committee listened just as you gentlemen have been listening, for a long time, and at great expense of their time, and they rejected a bill substantially in the same form as the bill pending here. This matter is not new. It has been rejected by Congress, not on constitutional grounds alone, but as a matter of equity and fairness to the community States.

Mr. Shallenberger. Without objection, we will grant permission to receive your brief and the two cases to which you refer.

Mr. DUNBAR. In *Phelps* v. *Commission* (13 B.T.A. 1248, Virginia) the rule was applied permitting a division of return between husband and wife under a partnership agreement, even though the board found that the object of the formation of the partnership was for the purpose of reducing income taxes.

Nineteen hundred and thirty-four Commerce Clearing House Tax Service, paragraph 7195, contains the following abstract of decision of the Board of Tax Appeals:

(Par. 7195.) *Walter F. Henningsen* v. *Commissioner* (Dec. 8495 (CCH); Dkts. 56668, 62845, Apr. 4, 1934, 30 B.T.A. 42).

Petitioner having made an effective gift of stock to his wife prior to the taxable years involved (1928 and 1929), was taxable on only one half of the dividends. Petitioner contracted to purchase corporate stock, pledging the stock with the vendor as security for the purchase price. He contemporaneously stated to his wife and to others that half of the stock belonged to his wife, and prior to the taxable years delivered to her a letter stating that she was owner of one half of the stock standing in his name. With consent of his wife, petitioner used the dividends on the stock to discharge the indebtedness for the purchase price. In the taxable years each returned as income one half of the dividends. Upon discharge of the indebtedness subsequent to the taxable years the stock was delivered to petitioner, who then caused certificates for one half to be issued to his wife. It is held the gift to a one-half interest in the stock was effective prior to the taxable years, and petitioner was taxable on only one half of the dividends. (See art. 51 at par. 51824, vol. I.)

Nineteen hundred and thirty-four Commerce Clearing House Tax Service, section 9232, contains the following abstract of court decision:

(Par. 9232.) *William R. Tracy and Helen Gregory Tracy, petitioners,* v. *Commissioner of International Revenue respondent.* (See U.S. Circuit Court of Appeals, 6th circuit; no. 6385. Decided Apr. 11, 1934.)

Petitions to review orders of the Board of Tax Appeals.

An individual having a marginal stock-trading account with brokers, or on about January 1, 1925, wrote the brokers directing them "to make a joint account of my transactions with your firm in the name of W. R. and Helen Tracy (individual and his wife), effective January 1, 1925. Orders for transactions in this account will be given to you for the writer." It is held that thereafter one half the income of the account was taxable to each, and one half of the interest charge for carrying the account and of the losses was deductible by each. "Tracy had no certificates to assign and deliver * * *. It is clear that Tracy made such delivery as the subject matter of the gift permitted. * * * It is not unusual for a husband to have the sole management of a business or joint adventure engaged in by him and his wife, so that his greater business experience shall the more likely contribute to its success." (See art. 51 at par. 51.8200, vol. 1.) Reversing Board of Tax Appeals decision (25 B.T.A. 1065, C.C.H.Dec. 7510, reported at par. 51.8200, 51.8215, and 181.166, vol. I, and par. 1697.075, vol. II.)

Before Hicks and Simons, circuit judges, and Taylor, district judge.

(The brief referred to is as follows:)

MEMORANDUM BRIEF

(Charles E. Dunbar, Jr., Spencer, Gidiere, Phelps & Dunbar, New Orleans, La., Attorneys for Louisiana Community Property Taxpayers Committee)

(*a*) Explanation of substantial character of wife's ownership of half of the community partnership income and property in Louisiana.

(*b*) Summary of the practical and substantial differences between the community property or marital partnership law and the common law.

(*c*) Illustrations of the practical and serious burdens on husbands in relation to their property rights in community-property States, as distinguished from common-law States, which entitle such community-property States to the benefit of separate returns for income-tax purposes.

(*d*) Discrimination and unfairness to community-property States resulting from the attempt by the Government to ignore local State laws regulating and fixing ownership and property rights by the passage of the proposed bill. (H.R. 8396.)

FOREWORD

Following an earlier opinion applicable to Texas rendered in 1920, the Attorney General of the United States, on February 26, 1921, rendered an opinion which was promulgated by the Commissioner of Internal Revenue as Treasury Decision 3138 on March 3, 1921, based on exhaustive study of the laws of all the community-property States. In these opinions, the Treasury Department announced that in Louisiana, Texas, Arizona, New Mexico, Idaho, Nevada, and Washington, all of which are community-property States, the wife, as a partner in community, was the vested and real owner of one half of all the community property and income of the community partnership, and that all community-partnership income, for the reason that it belonged equally to husband and wife, might be returned separately for income-tax purposes. (California was excepted from the ruling in 1921. Subsequent changes in the community-property law of California have resulted in the Government recognizing the same right of husbands and wives in California since 1930.)

In 1921 and 1924, attempts were made in Congress to amend the revenue act, which amendments were designed to compel the husband in community-partnership States to include in his individual income-tax return the half of the community income which belonged to his wife under the local State law. These amendments were similar to H.R. 8396, which is now pending in Congress. Arguments were made and briefs were filed in behalf of the community-partnership States in 1921 and 1924, showing that the proposed amendments were grossly discriminatory and unjust, and, as a result, the amendments were rejected by Congress. (Appendix 1.) When the sponsors of the legislation in 1921 and again in 1924 failed to persuade Congress to ignore the laws of the community-partnership States and to compel, by legislative fiat, the husband to pay taxes on his wife's half of the community-partnership income, efforts were made to change the rulings of the Treasury Department and of the Attorney General which had been in effect for many years. Following the decision of the Supreme Court in *United States* v. *Robbins* (269 U.S. 315), dealing with the law of California, the Treasury Department finally decided to institute test suits in some of the other community-partnership States, so that the Supreme Court of the United States might decide the matter. The Supreme Court of the United States in 1930 unanimously decided that the prior rulings of the Attorney General and Treasury Department were correct and that accordingly in the States of Louisiana, Washington, Texas, Arizona, and California the wife had a legal and real ownership in half of the community-partnership property and community-partnership income, and the right of husbands and wives in community-property States to make separate returns of the community income was again recognized. (Appendix 2.) The Treasury Department accepted the decisions of the United States Supreme Court dealing with the local laws of Louisiana, Texas, Washington, Arizona, and California, as applicable to the remaining community-property States of New Mexico, Idaho, and Nevada, without the necessity of further test cases. Another attempt is now being made by legislative act as to take away from husbands and wives in community-partnership States the rights, which, after a careful study of the local laws, have been recognized by three Attorneys General, the Treasury Department, and the Supreme Court of the United States. (Appendix 3.) The pending bill which has been introduced for this purpose is H.R. 8396, which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse who has the management and control thereof under the law of the jurisdiction in which the marital community exists, and such spouse shall alone be entitled to the deductions and credits allowed under the internal-revenue laws which are properly allocable to such property or income."

The purpose of the above-quoted bill, which is now pending, is to ignore and nullify the effect of the local community partnership laws of Louisiana, Washington, Texas, California, New Mexico, Arizona, Idaho, and Nevada, and force the husband in these States to include in his individual tax return property and income which, under the law of his State, does not belong to him, but which belongs to his wife. The present proposed legislation is not only grossly discriminatory and unfair to the community-property States, but it violates the Constitution of the United States.

The sixteenth amendment to the Constitution permits Congress to tax a person's income. The Federal Government, under this amendment, has adopted on the whole a policy of taxing the real or equitable owner of income as determined by local State laws. If ownership as created by the local statutes of the various States is not recognized by Congress and is to be disregarded by Congress endless complications, hardships, and gross injustice and discrimination will result and uniformity in matters of Federal taxation will be destroyed.

To the average layman and lawyer unfamiliar with the community property or marital partnership law, there is a general impression that the only difference between the laws of community-property States and common-law States is a difference of theory, and that the community-property law is only a fiction which gives community-property States benefits in relation to income-tax returns at the expense of common-law States that have a different system of law.

It is respectfully submitted that such an impression is erroneous and contrary to the law and facts as announced by three Attorneys General, the Treasury Department, and the Supreme Court of the United States (appendix 4).

The purpose of this memorandum is to explain simply and briefly, with as little use of technical language and the citation of authorities as possible, the general principles of the community law and by practical illustrations to demonstrate that the community-partnership law is not only theoretically different from the common law, but as a practical and substantial fact creates a marital partnership in which the wife is the real and substantial owner of one half of the community property and income with resulting burdens and practical limitations on the property rights of husbands, unknown to the common law, which entitle such husbands in community-property States to the corresponding benefits that they now enjoy in the way of separate income-tax returns.

BRIEF EXPLANATION OF THE EFFECT OF THE COMMUNITY-PARTNERSHIP LAW

The most important effect of the law of Louisiana and other community-property States is to create a partnership between the husband and wife, and, as a result, one half of the income and property acquired during marriage by this partnership immediately vests in the wife and the other half in the husband. The community system of law as it exists in Louisiana and other States is more analogous as a matter of legal principle and substantial fact to a partnership than any other common law legal status. The right of the husband to administer and manage the community-partnership property that is acquired after marriage as a result of the joint or individual efforts of the two spouses is in substance analogous to that of a managing partner at common law or a trustee at common law with very broad power of administration (appendix 5). Under the community or partnership theory, the husband and wife, with certain exceptions, become absolute and equal owners of all property and income acquired by them during the marriage share and share alike (appendix 6). The courts of the various States have repeatedly held that there is no distinction to be made between husband and wife as to the degree, quantity, nature, or extent of the interest each has in the community property (appendix 7). The husband, as managing partner or trustee, or, as he is called in some of the community States, the master of the community, is given the administration of the community property by law, and this right to administer is terminated by divorce, or by his death or the death of his wife. This right of administration may also be terminated, without the necessity of a divorce, by a separation of community property and a liquidation of the partnership, which may be claimed and obtained by the wife on the ground that the husband is a gambler, or if he is guilty of mismanagement or otherwise incompetent or incapable of properly administering the community-partnership property.

The pending bill proposes, although the husband is admittedly not the owner, to tax him on his wife's half of the community-partnership property, because he is the manager and administrator of the community partnership under the local State law. It is probably unnecessary to state, that in common-law States, a managing partner of a partnership is not required by the Federal revenue act to include in his individual income-tax return the share of the partnership income belonging to his other partner or partners. The proposed bill, however, would require the husband, who is analogous to a managing partner at common law, to include in his individual income-tax return not only his share of the community-partnership income, but the share which belongs to his wife as a partner in the community partnership. In short, it is proposed that for taxation purposes the community partnership in eight States is to be treated differently from ordinary partnerships in every State of the Union.

PRACTICAL ILLUSTRATIONS OF THE WIFE'S ONE-HALF OWNERSHIP OF THE COMMUNITY-PARTNERSHIP PROPERTY AND INCOME AND THE SUBSTANTIAL RESTRICTIONS AND LIMITATIONS PLACED ON THE HUSBAND'S ADMINISTRATION OF THE COMMUNITY-PARTNERSHIP PROPERTY

(*a*) The husband in Louisiana, in addition to being restricted by law as to gifts of community-partnership property (appendix 8), is expressly denied, by statute, the right to dispose of or deal with the community partnership property or income in fraud of his wife's property rights in half of the community-partnership property and community income. The liberal equitable power of our courts in relation to fraud are an ever-present potential protection to the wife against an unfaithful or dishonest husband, who deals with the community partnership property in violation of his trust or fiduciary obligation as master and managing partner of the community (appendix 9). The husband is merely the managing partner of the marital partnership, with full discretion and power of administration, but, as an agent and fiduciary, he must act in good faith in the handling of the wife's interest in the community partnership. If the husband wastes the community-partnership property in dissipation and debauchery for his own pleasure, it has been held in several community-property States which have no express statute on the subject similar to the Louisiana statute, that such conduct on his part is a disposition of the community property in fraud of his wife's rights. The husband, in common-law States, since he is the owner of all property acquired by him during marriage, can give it away to anyone he pleases and whenever he sees fit. Moreover, he can use it for gambling, waste it in dissipation, or dispose of it in any other way he chooses, and it is no fraud against the wife, and the wife has no right to complain, because, in common-law States, the husband is the exclusive owner of all of the property and the wife has no interest in it (appendix 10).

(*b*) Unlike the common law, and because of the community-partnership law, if the husband in Louisiana, even in the absence of fraud on his part, is wasteful, reckless, incapable, or incompetent, or if he is a careless administrator and is mismanaging the community-partnership property, or if his affairs are in such disorder as to jeopardise the wife's property rights, or, a fortiori, if he is fraudulently disposing of community property, the wife can immediately demand and obtain a separation of property, which carries with it the dissolution and liquidation of the community partnership. The wife, under such circumstances, receives immediate possession and control of her half of the community property existing at the date of the separation of property, and takes over the immediate control and administration of her half of the community property and removes the husband thereafter as managing partner of the community property. Each spouse thereafter manages his or her property, and all property thereafter acquired belongs, as separate property, to the spouse acquiring it. When the wife sues for separation of property, she may, as a matter of protection, immediately obtain an injunction restraining the husband from further activity as manager of the community property (appendix 11). This right of the wife in Louisiana is similar to the right of a partner in an ordinary commercial partnership to provoke a liquidation or dissolution of the partnership in case of mismanagement or fraud. Furthermore, this right of the wife in Louisiana has nothing to do with and is distinct from her right to a divorce, and can be asserted by her while she and her husband are living together as man and wife. This right of the wife to force a dissolution and liquidation

of the community, in case the husband is incompetent or guilty of mismanagement, or fraud, or if his affairs are in disorder, is a serious limitation and check on the husband's authority as manager of the marital partnership, and is a substantial safeguard established for the benefit and protection of her property right. This very practical remedy given by the Louisiana law to the wife is consistent only with the theory that the husband is only an administrator or managing partner, and that the wife has a real and substantial ownership in half of the community property administered by the husband, which the Louisiana courts will protect. In common-law States the wife, of course, has no such rights, because there is no community partnership between husbands and wives created and established by State law. The husband, in common-law States, is the owner of all property acquired by him during marriage, and it is immaterial whether he is incompetent or incapable, and he can spend it in dissipation or debauchery, gamble with it, or mismanage it, as he chooses, and the wife, because she has no ownership or interest in her husband's property, has no legal right to complain (appendix 11).

(*c*) That the husband is only the managing partner of the community partnership and cannot enjoy or use the property for himself is further demonstrated by his inability to use community-partnership income or property without accountability to his wife. Thus, if he uses any part of the community-partnership income for the benefit of his separate estate, he becomes a debtor to the community partnership to the extent to which his separate estate has been enhanced in value. If he pays his separate debts out of the community funds, his separate funds must reimburse the community for the amount so paid. In common-law States, where there is no community partnership between husbands and wives, all property and income acquired by the husband during marriage belongs exclusively to him, and all property and income acquired by the wife during marriage belongs to her, and the husband can use and spend his property and income to pay his personal and separate debts, or in any other way he pleases, and his wife has no legal right to complain, because she has no interest or ownership in the property and income acquired by her husband during marriage (appendix 12).

(*d*) The husband in Louisiana can, by his will, dispose only of his half of the community property, and is powerless to affect the wife's half. The converse of the husband's lack of testamentary power over the wife's half of the community income is illustrated by the completeness of the wife's power of disposition of her half. The wife can will her half of the community property to anyone she chooses, even to a lover, and when she dies the husband must, by agreement or judicial partition, sell the community property and liquidate any and all business ventures in order to deliver the value of half of the marital partnership property to the legatee or legatees of the wife. It is only because one half of the community-partnership property belongs to the wife that the law gives her the right of testamentary disposition of half of the community-partnership property and income. At common law, because the husband owns all property and income acquired by him after marriage, he has the free and unrestricted power of testamentary disposition of the whole of this property, and the wife cannot dispose of any of his property by will. Likewise, since the wife is the exclusive owner of all property acquired by her during marriage, she can dispose of all of it by will, and the husband cannot dispose of any part thereof. This is because there is no community partnership in common-law States, and the wife has not a half interest in any part of the husband's property acquired during marriage, and the husband has not a half interest in any part of the wife's property acquired during marriage (appendix 13).

(*e*) If the wife in Louisiana dies without having made a will, her half of the community partnership property and income descends to her heirs, and her husband is powerless to prevent it. It has been held in Louisiana that even the illegitimate children of the wife, born before her marriage and not the children of her husband, were entitled, on her death, to inherit her share of the community estate, to the exclusion of the surviving husband (appendix 14). If the wife in Louisiana dies, her heirs or legatees pay both State and Federal inheritance taxes on her half of the community-partnership property and income, and if the husband happens to be the legatee or heir of his wife, he is required to pay both a State and Federal inheritance tax. Thus, under the law of Louisiana, if a man has the misfortune to lose his wife, he must pay to the United States and the State of Louisiana a heavy inheritance tax for the privilege of inheriting from her one half of the property which in a common-law State would be considered entirely his. In this connection, it should be noted that the Treasury Department recognizes the community partnership and the wife's half ownership in the community property and income for the purpose of levying an inheritance tax on the husband or the heirs of the wife, on the theory that they receive the wife's property and income, and yet, if the present bill is adopted, the Government will compel the husband to pay an income tax on the same property and income, evidently on the theory that it should be treated as his property. We submit that this is in effect "blowing hot and cold" at the same time (appendix 15).

The rules we have stated are unknown to the common law. At common law all of the property acquired by the husband during marriage belongs to him alone and, accordingly, upon his death, descends to his heirs, and his heirs must pay both State and Federal inheritance taxes; and, conversely, all the property acquired by the wife during marriage belongs to her alone and, upon her death, descends to her heirs, and her heirs must pay both State and Federal inheritance taxes.

(*f*) The community partnership in Louisiana is dissolved, and the husband is automatically removed as managing partner in case a divorce is obtained by either husband or wife and, as a result, the community partnership property is immediately liquidated and the community property and accured income divided equally between the husband and wife. This is true irrespective of the merits of the marital disagreement and even though the wife alone is guilty and wholly to blame for the situation bringing about the divorce and the resulting dissolution and liquidation of the community partnership (appendix 16). The right of the wife in this connection is independent of any question of alimony, which is governed and regulated by separate statutes. The wife's right, in the event of divorce, to remove the husband as manager of the community partnership and immediately receive one half of the community-partnership property and income results from the fact that in Louisiana she is the owner of one half of the community-partnership property and income. As a consequence, therefore, if a wife in Louisiana is guilty of adultery and runs away with her lover, she can leave instructions with her attorney in connection with the divorce proceedings to require an immediate dissolution and liquidation of the community partnership, and she can force the husband to account for and deliver to her immediately one half of the community-partnership property and income, which she can then spend, if she pleases, in luxury with her lover. In a common-law State, a wife leaving her husband under such guilty circumstances could be divorced by her husband and would not even be entitled to alimony, much less to an equal division of property. The simple reason for this result, as we have said before, is because in common-law States the husband is the exclusive owner of all of the property acquired by him during marriage, and the wife has not the slightest interest or ownership in his property.

SUMMARY

In the light of the many illustrations of the practical and substantial nature of the wife's ownership and the restrictions on the husband as agent or managing partner of the community partnership we have briefly outlined, we submit that the proposed bill is grossly unjust and discriminatory. The pending community property bill, in substance, proposes to tax the husband on income which belongs to his wife, by treating the income as if it were his, when, as a matter of fact, he cannot give it away if he chooses—when he cannot dispose of it in fraud of his wife's property rights, if he pleases—when, if he is reckless, careless, or a bad manager, he loses the administration of it—when, if he is of a speculative disposition, or the disorder of his affairs is such as to jeopardize his wife's property rights, he loses the administration of it—when he loses the administration of it in case of a divorce and even without any fault on his part, if his wife is unfaithful to her marital obligation—when he cannot spend it to improve his separate property, if he wants to—when he cannot use it to pay his separate debts, if he pleases—when he has no right or power to have it descend to his heirs—when, if his wife dies, he loses the administration of it and must deliver it to his wife's heirs—and when, if it is willed to him by his wife, he takes it not as owner, but by inheritance, and is compelled to pay both a State inheritance tax and a Federal estate tax for the privilege of receiving it.

None of these restrictions and limitations on the power of the husband with regard to property and income acquired during marriage exists in common-law States, where the husband is the owner of all of the property and income acquired during marriage; and, conversely, the restrictions and limitations we have outlined exist in Louisiana, because the wife is the owner of one half of the property and income acquired during marriage by the marital partnership composed of both husband and wife.

We have emphasized the fundamental and practical features of the Louisiana community partnership law, in order to show clearly that the community partnership between husband and wife in Louisiana and other community-property States is not a fiction, but is, in substance, a partnership imposed by law, which creates burdens and limitations as well as privileges in relation to the property rights of husbands and wives. These burdens and limitations on property rights are unknown in the common-law States, and, we submit, if it were true that any benefits flowed from the community partnership law, they are more than counterbalanced by the multitude of burdens and restrictions placed upon the property rights of husbands and wives in Louisiana, which do not exist in any common-law State. The proposed bill is unjust and discriminatory in its practical effect, and violates sound principles of uniformity in Federal taxation.

PRACTICAL INSTANCES OF DISCRIMINATION AND UNFAIRNESS, WHICH WILL RESULT FROM THE PASSAGE OF THE PROPOSED BILL

An attempt to force the husband and wife in Louisiana, who, under our local law, are in substance partners, to report all of the community-partnership income in the name of the husband alone, when, as a matter of law and fact the husband owns only one half of the community income, and is merely the managing partner of his wife's other half, will not produce uniformity, but, on the contrary, will unfairly discriminate against Louisiana and other community-property States, and will ignore the fundamental law of our State, by treating what in Louisiana is in substance a partnership created by law, differently from voluntary partnerships in every common-law State.

Furthermore, in addition to the discrimination resulting from voluntary partnership it is important to note that as a matter of fact there are a number of common-law States that permit husbands and wives to form partnerships volunarily, and in these States, husbands and wives may make voluntary-partnership agreements which may accomplish the same result, by contract, that the law accomplishes in Louisiana. Where such a partnership agreement has been entered into between husband and wife in these common-law States, the commissioner has recognized that each spouse may return his or her distributive share of the partnership income, and is liable only for the tax upon such share. A list of 21 States in which the Government has authorized that this may be done may be found in 1930 Prentice-Hall Tax Service, section 15507. Moreover, such a voluntary partnership will not be affected by the proposed community-property bill, which only applies to so-called "community-property States", and which is, therefore, intended to and actually does affect only eight States. The adoption of the proposed bill, therefore, would result in permitting voluntary partners in other States to divide income, and would, in eight States of the Union, where such a partnership is created by law and called a community partnership, prevent the division of income between the partners and the making of separate returns by the partners.

On the other hand, if the husband in community-property States is analogized to a trustee at common law insofar as he manages one half of the community-partnership property and income for his wife, surely it cannot be contended that one in the position of a trustee for another person can or should be forced to add the income derived from property administered for the benefit of the beneficiary to his individual property and income for Federal income-tax purposes. Yet this is, in substance, what the pending community-property bill proposes to do, by forcing a Louisiana community husband to add the community-partnership income to his personal income for taxation purposes.

It is respectfully submitted that if the inhabitants of common-law States should be of the opinion that it is to their interest to place the burdens and limitations on the husband's earnings and accumulations during marriage, and confer upon the wife a substantial property right in the earnings and accumulations of the husband during marriage, which the law of Louisiana confers

upon her, there is nothing to prevent them from changing their laws accordingly, and from accepting this advanced view of women's rights, by adopting the community-partnership system. By establishing a community-partnership system which has prevailed in eight States long before the income-tax amendment was adopted, common-law States may obtain any advantages, if such there are, that flow from the law and facts in community-partnership States. It is evident that the community-partnership system is so substantial in its nature with reference to property rights that common-law States, up to this time, have considered it objectionable in this regard and not desirable to adopt on any theory of Federal income-tax benefit.

With reference to the argument as to the necessity for bringing about harmony in the Federal taxation law, this is impossible on account of the fact that the Federal tax must be based on the person's income, and what is property and income of an individual, corporation, or partnership is necessarily a matter depending on the constitutions and laws of the various States of the Union. We have already pointed out that in many common-law States husbands and wives may make voluntary partnership agreements and obtain the same benefits which result from a community-property partnership established by law. More than this, in all common-law States a husband may make a gift of half of his property to his wife and thereafter the income from the property thus donated may be returned as the separate property of the wife. This is done as a matter of practice, and have never been questioned. The laws of Louisiana and other community States make the wife the owner of one half of the income and property acquired during marriage and yet the Federal Government, by the proposed amendment, is attempting to ignore this fundamental law of the State for taxation purposes. The result will be, in case the proposed bill is adopted, that simply because the property becomes joint property as a result of the positive law of Louisiana and other community-property States, a different rule will be applied in community States than is applied in other States where the same situation is brought about voluntarily.

In Louisiana, a gift by a husband to his wife during marriage is as a matter of law revocable during the marriage, and in view of the provisions of the revenue act taxing income from revocable trusts to the grantor, the Treasury Department may contend that the income from property donated by a husband to his wife should remain taxable to the husband. In common-law States, no such contention can be made and the income from donated property is clearly taxable to the wife only. Thus the Louisiana law may prevent the husband from making an effective division with his wife by donation to her. This is not important so long as the present Treasury regulations stand, recognizing the right of the husband and wife in Louisiana each to return his or her half of the community-partnership income, but it affords another reason why, so long as spouses in noncommunity States can make an effective division of property by donation from one spouse to another with a resulting division of income for income-tax purposes which spouses in Louisiana may not be able to accomplish, Congress should not undertake by passage of the pending bill to ignore the division which the fundamental law of Louisiana automatically accomplishes between the spouses (appendix 17).

It is important to note, in connection with an explanation and statement of the practical effect of the wife's half interest in community-partnership property in Louisiana and other community-property States, that a common-law State will recognize the ownership and legal title of the wife in one half of the community-partnership property acquired while the spouses are domiciled in Louisiana, when the spouses leave Louisiana and community-partnership property is removed by the spouses from Louisiana to other States. It is a generally recognized proposition of conflict of laws that the title and status of property is to be determined by the law of the jurisdiction under which the property was acquired, and in case of the removal of the property to another State, the State to which the property is removed will assume and recognize the law of the jurisdiction from which the property was removed, in order to determine the ownership of the property. Thus, if a husband and wife domiciled in Louisiana accumulate $1,000,000, this is community property, and under the amendment disregarding the Louisiana law for Federal tax purposes, the husband is compelled to report as his income the wife's one half of the income of this property. If the husband and wife, however, sell their Louisiana property and move to New York or some other common-law State and invest the proceeds of the property in the latter States, the common-law States,

under the law and decisions of the courts, recognize the vested interest of the wife created by the law of Louisiana, where the property was acquired, and the $1,000,000 invested in New York is therefore recognized by the courts of New York as belonging one half to the husband and one half to the wife. This is true, even though the property technically may stand in the name of the husband in the common-law State, for under such circumstances the husband is considered trustee for $500,000 of the property for the benefit of the wife. In New York, therefore, or in any common-law State, when the property taken from the community State is reinvested, one half immediately becomes the property of the husband and the other half the separate property of the wife, and the husband and wife may make separate returns for Federal income-tax purposes (appendix 18).

It is clear, in the light of these facts that if the proposed bill is passed the result of the situation will be that a husband and wife who sell their community property in Louisiana and reinvest it in common-law States where the same property will be considered separate property, will be able to make separate returns in the common-law States, whereas, if they had remained in Louisiana they could not make separate returns. The proposed bill, in attempting to emasculate the law of Louisiana and other community-property States, and applying, as it does, only to community-property States, would result in discrimination against community-property States, and would not be legally applicable when the husband and wife removed their property to another State.

We have the amusing and illogical situation of Congress attempting to fix property rights in eight States for taxation purposes in the very teeth of the law of the eight States involved, when, if the same property is removed to the other States of the Union, these latter States recognize the law of Louisiana and the property rights of the spouses, and Congress following the law of the common-law States, taxes the former community husband and wife on the very basis that they should have been taxed on if the pending community-property bill had not been adopted. In short, Congress would recognize for income-tax purposes the law of common-law States which recognize the law of Louisiana, but when dealing directly with Louisiana citizens the Louisiana property law would be disregarded.

Another gross discrimination against and injustice to citizens of community-property States that would result from the passage of the pending bill is illustrated by the fact that earnings and profits of both the wife and husband become community-partnership income and property in community-property States. In Louisiana, for example, the salary or wages of the wife, if she is employed, and the earnings of the wife, if she is engaged in a business, occupation, or industry separate from her husband, become community-partnership income and property if she is living with her husband at the time they are acquired. Moreover, money and profits made by a wife in speculation with money or property belonging to her separate estate become the income of and belong to the community partnership. (Appendix 19.) On the contrary in a common-law State the wife's earnings and profits during marriage would be her separate income and property. The husband in common-law States has no interest or ownership whatever in her earnings or profits and she can make them the subject of a separate return upon which she pays a tax based only upon their amount, and the common-law husband in his tax return can omit all such earnings and profits of his wife. If the present bill is adopted the husband in Louisiana and other community-property States would have to pay on all the wife's earnings and profits as well as on all of his own, and in addition upon dividends, rents, and interest upon his wife's separate property under his administration. The accumulation of all of this income in a single return as required by the present bill would, of course, greatly increase the tax rates and the resulting tax in community-property States would be much greater than in a common-law State where the wife could make a separate return of her own earnings. In short, husbands and wives in community-property States would be required to pay much larger taxes than husbands and wives in common-law States on the same character of income. This is only another illustration of the inequity and unfairness resulting from any attempt on the part of the Government to disregard the local State laws with reference to the ownership of income and property. Unless the Government is prepared to go to the full extent of requiring husbands and wives in every State, common law as well as community, to combine all their income in one return, there can be no justification for requiring such a result in community States alone.

We might give numerous illustrations, showing that by contract the ownership of property may be and is frequently changed in the various common-law States, resulting in a different application of the Federal income-tax law. This condition of affairs is inherent and fundamental under our State and Federal Constitutions, and ownership and property rights, as fixed by the various State laws must, in the nature of things, be followed by the Federal Government in applying its laws. It is submitted that the principles we have outlined are elementary under our constitutional system. In Louisiana, the community-partnership law is imposed by statute, and does not result from contract, and, of course, was not adopted to bring about any income-tax benefits, because the community-partnership law was in existence many years before the adoption of the first income-tax law. In fact, the community partnership law has been a part of the civil law of Louisiana ever since Colonial days. Louisiana inherited the community-partnership law from France, which in turn borrowed it from Spain, where it had prevailed since the seventh century (appendix 2, 3, 5, 6, and 7).

UNIFORMITY AMONG ALL STATES COULD FAIRLY BE OBTAINED BY FEDERAL LEGISLATION ONLY BY REQUIRING INCOME OF HUSBAND AND WIFE IN EVERY STATE TO BE COMBINED IN FEDERAL INCOME-TAX RETURNS

It is apparent, since the law of each State must determine questions of ownership, that it is not possible to obtain identical practical results from the operation of the Federal revenue laws in each of the 48 States of the Union, unless Congress wishes to do violence to the dual character of our Government and the historic and settled principle that the Federal Government will recognize property and the ownership of property as defined and created by local State laws in the various States. It has been suggested that uniformity is desirable. It is obvious that uniformity cannot be obtained by having Congress, in the form of a discriminatory legislative act, disregard the fundamental laws of eight States of the Union, and, at the same time, recognize the local law of all of the other States of the Union as a guide and basis for the application of the Federal income-tax law. If the Government desires to tax the separate income of both husband and wife as a whole and as a unit in one return, it is not fair to attempt to bring about this result by legislative fiat in only eight States of the Union. If identical uniformity is desired, Congress should tax husbands and wives as a unit in all the States of the Union, and compel a single return in which must be included the income of both husband and wife in all States. Insofar as husbands and wives are concerned, such a law would be perfectly uniform in its application in every States of the Union. In fact, we understand that this is the method of solving the problem suggested and recommended by Secretary Morgenthau of the Treasury Department. (See statement of Secretary Morganthau, issued Dec. 15, 1933; appendix 20.) In referring to this method of solving the problem of uniformity, we do not intend to suggest that husband and wives of common-law States would approve such a law even if it could be sustained under the Constitution. In fact, it might be contended with considerable force, that by the adoption of such a bill, husbands and wives would be discriminated against in favor of single persons.

The foregoing brief summary of the communtiy partnership law and its practical operation make clear how futile and impossible it is for Congress to ignore property rights in an attempt to produce uniformity, and that instead of securing uniformity, the proposed bill, even if it could be adopted under the Constitution, will produce endless confusion and inequities. Moreover, we feel that we have demonstrated that the proposed bill (H.R. 8396) is discriminatory and if passed will result in gross unfairness to the taxpayers of eight States of the Union.

APPENDIX

The following decisions, statutes, and authorities are submitted in support of the statements of law contained in the foregoing brief:

(1) Volume 61, Congressional Record, no. 146, for November 3, 1921, pp. 8037, 8038; report of hearings before Committee on Ways and Means, House Reports, revenue division, 1924, pp. 194, 348, 375 to 482, inclusive.

(2) *Poe* v. *Seaborn* (Wash.), 75 Law Ed. 239–247, 282 U.S. 101–118; *Fred O. Goodell* v. *I. B. Koch* (Ariz.), 75 Law Ed. 247 282 U.S. 118–122; *Jacob O. Bender* v. *Wm. Pfaff* (La.), 75 Law Ed. 252, 282 U.S. 127–132; *Geo. C. Hopkins*

v. *G. W. Bacon* (Tex.), 75 Law Ed. 249, 282 U.S. 122–127; *United States* v. *Malcolm* (Calif.), 75 Law Ed. 714, 282 U.S. 792; see also *Warburton* v. *White*, 176 U.S. 484; *Arnett* v. *Reade*, 220 U.S. 311.

(3) Opinions of Acting Attorney General Mitchel in 1927, and opinions of Attorney General Daugherty in 1924; Attorney General Stone in 1924, and Attorney General Sargeant in 1926; see 32 Op. Att. Gen. 298, 435; 34 Ibid. 376, 395; 35 Ibid. 89, 265. General Counsel Memorandum, 6351; 32 Op. Att. Gen. 435. T.D. 2090, 2137, Of. Dec. No. 426, reported at 2 C.B. 198. T.D. 3071, reported at 3 C.B. 221; and T.D. 3138. See also appendix (1), supra.

(4) See Appendix (1), (2), and (3), supra.

(5) Louisiana Revised Civil Code, arts. 2404, 2399, 2402, 2334. *Childers* v. *Johnson*, 6 La.Ann. 634, at p. 641.

(6) Louisiana Revised Civil Code, arts. 2334, 2399, 2402, 2404, 2386, 2385, and 2406.

(7) See State decisions cited and quoted in Supreme Court decisions referred to in appendix (2), supra, and decisions quoted in opinion of Attorney General Palmer, of February 26, 1921 (32 Op. Att. Gen. 435), which was publyished and promulgated by the Treasury Department on March 3, 1921, in connection with T.D. 3138. See also authorities and statutes quoted in brief for respondent in the Supreme Court of the United States, in the case of *Jacob O. Bender* v. *William Pfaff*, Docket No. 86, October term, 1930, filed in behalf of respondent and Louisiana taxpayers by Charles E. Dunbar, Jr., and Monte M. Lemann, attorneys, of New Orleans, La.

(8) Louisiana Revised Civil Code, art. 2404; *Melady* v. *Succ. of Bonnegent*, 142 La. 534; *Bister* v. *Menge*, 21 La.Ann. 216; *Radovitch* v. *Jenkins*, 123 La. 355; *Snowden* v. *Cruse*, 152 La. 144; *Ramsey* v. *Beck*, 151 La. 190; *Succ. of Moore*, 42 La.Ann. 331, at p. 341. See authorities contained in brief or respondent in Supreme Court of the United States in the matter of *Jacob O. Bender* v. *William Pfaff*, Docket No. 86, pp. 23–26, inclusive.

(9) Louisiana Revised Civil Code, art. 2404; *Smallwood* v. *Pratt*, 3 Rob. 132; *Dixon* v. *Dixon's Executors*, 4 La. 188; *Phillips* v. *Phillips*, 160 La. 813. See authorities contained in brief filed in Supreme Court of the United States in behalf of respondent in the matter of *Jacob O. Bender* v. *William Pfaff*, Docket No. 86, October term, 1930, pp. 26–28, inclusive.

(10) See authorities referred to in appendix (9), supra.

(11) Louisiana Revised Civil Code, arts. 140 to 161, inclusive, and arts. 2425 to 2437, inclusive, and art. 155. *Davock* v. *Darcy*, 6 Rob. 342; *Jones* v. *Morgan*, 6 La.Ann. 630; *Wolfe & Clark* v. *Lowry*, 10 La.Ann. 272; *Mock* v. *Kennedy*, 11 La.Ann. 525; *Webb* v. *Bell*, 24 La.Ann. 75; *Vickers* v. *Block*, 31 La.Ann. 672; *Chaffe* v. *Watts*, 37 La.Ann. 324; *Brown* v. *Smyth*, 40 La.Ann. 325; *Walmsley* v. *Theus*, 170 La. 417; *Gasteur* v. *Gasteur*, 131 La. 1; C. F. opinion of district court in this case, R. 21; *Carite* v. *Trotot*, 150 U.S. 751; *Jones* v. *Jones*, 119 La. 677; *Larose* v. *Maquin*, 150 La. 353, at 358; La. Code of Practice, art. 298; *Hill* v. *Hill*, 115 La. 489; *White* v. *White*, 159 La. 1065; see authorities referred to, pp. 28 to 30, inclusive, in brief for respondent, filed in the Supreme Court of the United States in the case of *Jacob O. Bender* v. *William Pfaff*, Docket No. 86, October term, 1930.

(12) Louisiana Revised Civil Code, arts. 2403, 2408; *Glenn* v. *Elan*, 3 La. Ann. 611; *Dillon* v. *Treville*, 129 La. 1005; succ. of Casey, 130 La. 743; succ. of Goll, 156 La. Ann. 910. (Compare *Childers* v. *Johnson*, 6 La. Ann. 634). See authorities referred to, pp. 35 to 38, inclusive, in brief for respondent, filed in the Supreme Court of the United States in the case of *Jacob O. Bender* v. *William Pfaff*, Docket No. 86, October term, 1930;

(13) See Louisiana Revised Civil Code, arts. 915 and 916; *Theall* v. *Theall*, 7 La. 226; *Ramsey* v. *Beck*, 151 La. 190; succ. of Hayes 33 La. Ann. 1143; succ. of Moore, 40 La. Ann. 531;

(14) Louisiana Revised Civil Code, art. 915; *Bossier* v. *Herwig*, 112 La. 539; *Brooks* v. *House*, 168 La. 542. See authorities referred to in appendix (13), supra;

(15) *Burton* v. *Brugier*, 30 La. Ann. 478; *Webre* v. *Lorio*, 42 La. Ann. 178; *succ. of Marsal*, 118 La. 212; Coreil's Estate, 137 La. 702; *Liebman* v. *Fontenot*, 275 Fed. 688; succ. of May, 120 La. 692; see appendix (13) and (14), supra. See authorities referred to, pp. 38 to 43, inclusive, in brief for respondent filed in the Supreme Court of the United States in the case of *Jacob O. Bender* v. *William Pfaff*, Docket No. 86, October term, 1930;

(16) Louisiana Revised Civil Code, arts. 123, 136, 138, 149, 150, 155, 159, and 2406. Louisiana Code of Practice, art. 298. *Dillon* v. *Dillon*, 35 La. Ann. 92; succ. of Lebesque, 137 La. 567; *Crochet* v. *Dugas*, 126 La. 285; *Williams* v. *Goss*. 43 La. Ann. 868; *McClelland* v. *Gasquet*, 122 La. 241; *Hill* v. *Hill*, 115 La. 490; *White* v. *White*, 153 La. 313, 159 La. 1065; *Lockhart* v. *Dicey*, 161 La. 282; *Nichols* v. *Her Husband*, 7 La. Ann. 263; *Ford* v. *Kittredge*, 26 La. Ann. 190; act 21 of 1928, amending art. 160 of the Revised Civil Code. See authorities referred to, pp. 31 to 35, inclusive, in brief for respondent, filed in the Supreme Court of the United States in the case of *Jacob O. Bender* v. *William Pfaff*, Docket No. 86, October term, 1930;

(17) Louisiana Revised Civil Code, art. 1749.

(18) *Depas* v. *Mayo*, 11 Mo. 314; *T. C. Phillips, petitioner*, v. *Commissioner*, 9 B.T.A. 153 (1927); succ. of Popp, 146 La. 464. The Treasury Department has also recognized this rule in the application of the income-tax law in solicitor's opinion 121, reported in Internal Revenue Cumulative Bulletin for December 1921 at p. 197;

(19) *Haughton* v. *Hall*, 177 La. 237, 148 So. 37 (1933); *Hellberg* v. *Hyland*, 168 La. 493 (1929); Louisiana Revised Civil Code, articles 2402, 2334, as amended by Act No. 170 of 1912 and Act No. 186 of 1920; see authorities referred to in appendix (5) and (6), supra;

(20) Revenue Revision 1934, hearings before the Ways and Means Committee, December 16 to 21, 1933, and January 9 to 11, 1934, pp. 112–113.

Mr. SHALLENBERGER. The next witness will be Mr. J. Y. Fauntleroy, of New Orleans.

Mr. FAUNTLEROY. It is understood that Mr. Hutcheson and several other gentlemen who have to leave town are to appear ahead of me.

STATEMENT OF PALMER HUTCHESON, HOUSTON, TEX.

Mr. SHALLENBERGER. Mr. Hutcheson, you are next. Will you please state your name and whom you represent?

Mr. HUTCHESON. I am Palmer Hutcheson, of Houston, Tex., associated with Mr. R. C. Fulbright in representing the taxpayers' committee organized in Houston, and in behalf of other Texas taxpayers, for the purpose of presenting an argument before this committee relative to the proposed legislation taxing community income as proposed.

Mr. SHALLENBERGER. You may proceed.

Mr. HUTCHESON. I had the pleasure and privilege of being associated with Mr. Fulbright and other Texas lawyers in the presentation in the case of *Hopkins* v. *Bacon* (282 U.S. 122) in the Supreme Court of the United States, in which the right of the husband and wife in Texas to divide community income in reporting their income tax was sustained. In that case, the Supreme Court of the United States cited and relied strongly upon the decision of the Supreme Court of the State of Texas, which is unchallenged, in the case of Arnold against Leonard, cited by my colleague Mr. Eustis Myers, during the argument this morning. In that case the very issue that is here before this committee was involved.

The Supreme Court of Texas had before it for consideration a statute which proposed to give the wife the rents and revenues from her separate property and also gave her the right to exempt those rents and revenues from liability for her husband's debts, even though they might be community debts. The court struck down that part of the statute which sought to make that part of the property her separate property and yet sustained the element of control that gave her the right to exempt it from his debts, showing that in the very fundamental case which the Supreme Court of the United States used as the basis for its decision upholding the right to file

separate returns of community income, that the very distinction between ownership and control was involved before the Supreme Court of Texas and the distinction clearly and definitely drawn that control was in no way the equivalent of ownership nor ownership the equivalent of control.

Now, this honorable committee has had cited to you numerous cases of the Supreme Court of the United States to a like effect, as, for instance, *Arnett* v. *Reade* (220 U.S. 311) and *Warburton* v. *White* (176 U.S. 323), the one coming from the State of Washington and the other from the State of New Mexico, so that this is not peculiar; and I may say it was decided by that eminent community-property law jurist, Chief Justice White of the State of Louisiana, so that you have a recognition of a principle that flows through the veins of the laws of all of these States that control has no relation or bearing upon the question of title and enjoyment in the sense of actual beneficial use of a property right which the Constitution of the United States and of the State will always defend and preserve.

In *Arnett* v. *Reade* and *Warburton* v. *White*, the identical question was involved as to whether or not taking away from a husband that control which he previously had was an impairment of any constitutional right under the fourteenth amendment of the Constitution, and in both cases, without hesitation, the one decided by Chief Justice White and the other, I believe, by Justice Holmes, who wrote the opinion in the Robbins case, where it turned off on a question of expectancy instead of a vested interest; in both of those cases, *Arnett v. Reade* and *Warburton* v. *White*, the Supreme Court of the United States, without hesitation, and I believe without dissent, laid down the rule that the community right of control and management in the husband or wife was merely an agency, was merely a management of the partnership, and that it had no bearing or relationship to the question of ownership.

Now, therefore, I say to this honorable committee that the Supreme Court of the United States has decided this very issue that is presented here, and unless, in the words of the bill, you can consider something as being what it is not, then this bill necessarily must fail, because you cannot consider the income of both the income of one.

May I pause here to say that this case has also been decided in two cases arising from the State of Wisconsin, and I wish that Mr. Frear were here today, in view of his interest in this matter, because it is his desire, I am sure, to consider all sides of this question. He might with us here for a moment analyze those case, the case of Schlessinger against Wisconsin and the case of Hoeper against Wisconsin, both of them arising under statutes passed by a liberal legislature, I presume, in the State of Wisconsin, attempting to find out the limits on its constitutional rights; submitting questions, you might say, as Mr. Frear suggested, to the Supreme Court of the United States and getting back the invariable answer, always ringing true, you cannot disregard the property right of another person.

The Schlessinger case involved the question of whether or not you could tax a gift made by a man 6 years prior to his death, or within a period of 6 years prior to death, as though it were his own, as though it were considered to have been made in contemplation of death. The Legislature of Wisconsin had said:

We shall consider that it was made in contemplation of death and you do not have any right to say it was not.

The Supreme Court of the United States said:

You cannot consider as the property of A what is already the property of B, unless you show that it was made in contemplation of death for the express purpose of avoiding the inheritance tax.

The Schlessinger case, and that came before the Hoeper case, involved an inheritance-tax statute. The Hoeper case involved an income-tax statute, where they sought to say:

All right, we have failed to catch you on the inheritance end, but we will catch you on the income tax end; we will say that the husband and wife must report their income as a unit.

The Supreme Court of the United States again answered the gentleman from Wisconsin and those who believe in this sort of legislation and said:

No, you cannot do that, gentlemen; you cannot tax the income of A as the income of B any more than you can tax the inheritance of A as the inheritance of B.

Furthermore, throughout all of the States this question has been answered by the ringing declarations of every State court and by the refusal of the Supreme Court to grant writs of error in any case to the contrary that the husband and the wife have the right and owe the duty to treat their respective halves of the community property as an inheritance at the time of their respective deaths. In other words, that you not only can but must tax the wife's half of the community property when she dies and tax the husband's half when he dies, whichever dies first. Where is the unanswered part of this question? I fail to see where it is unanswered unless it is pursuant to the broad question, "Where there is a will, there is a way", and that in some way, after trying since 1920, the Government is going to apply the common-law doctrine to the civil-law States.

I do not believe that it is the intention of Congress or of anybody else, from final analysis of this thing, to deprive anybody of property without due process of law, and the Supreme Court has already said that you cannot deprive them of property without due process of law.

Now, may I say further to the members of this honorable committee that no Attorney General of the United States has said that you can reach this income, and that every Attorney General who has given an opinion one way or the other, especially ruling on the question, has absolutely sustained the right to file separate returns as community income.

Harking back last night to the brief that was filed in behalf of all of the taxpayers from all of the community States that were before the Supreme Court at the time of the decision of the case of Hopkins versus Bacon, and among which there were Arizona, Washington, Louisiana, and Texas, and in which the attorneys who are here mostly now filed a joint brief, including myself, they quoted and relied on the opinion of the Attorney General of the United States that first put this recommendation or this determination into final form.

I do not say the Attorney General was infallible; no attorney is infallible. But it is strange to say, or, rather, it is refreshing to see

that throughout that opinion has been adhered to and followed in every instance by the Supreme Court of the United States. In that opinion, the Attorney General laid down the rules that in all States, except California, and since that time the California law has been changed, that they were entitled to divide the community income into separate returns.

The Supreme Court of the United States, when those respective States came before them, ruled exactly as the Attorney General did.

Mr. HILL. Will you put in the record the opinion of the Attorney General?

Mr. HUTCHESON. Yes; I shall do that right away.

Mr. SHALLENBERGER. Are you saying now that the Attorney General made a decision in some cases that the people in the community-property States were entitled to make separate returns?

Mr. HUTCHESON. Yes, Mr. Chairman; I do say that, and I refer to the opinion of the Attorney General which will be filed, if it is liked, with the committee, in Treasury decision 3071, which embraces the laws of Texas primarily. That was the first opinion.

Mr. SHALLENBERGER. Do you mean to say that is a constitutional right and cannot be taken from them?

Mr. HUTCHESON. The question of constitutional right was not expressly passed on by the opinion of the Attorney General.

What I am saying now is that as far as the opinion of the Attorney General went in drawing the distinction between where the wife has a mere expectancy, as she had in the Robbins case in California, and where she has a vested property right, as she had under the ruling of the Attorney General in the other seven States, the Supreme Court drew exactly the same distinction and based it on title and not on control, in all of the cases that came before it. The Supreme Court held that California then did not have the right and has since held that California does have a right, because it has vested the right of the wife, as Mr. Evans will verify, I am sure, and as the Malcolm case will establish.

Mr. SHALLENBERGER. Has the Federal Government attempted to levy, if I may use that term, a single return, and impose that by law?

Mr. HUTCHESON. No; that has not been attempted in the sense of a direct enactment such as this, saying you will consider it as his, even though it is hers, and I may say they never will have such an enactment, I hope and trust.

Mr. SHALLENBERGER. I have been told once by a tax official in a certain Eastern State, and I will not name the State, that if you refuse to make a return, that the property-taxing authorities, we will say, the assessor, could see a citizen walking down the street and say, "we will assess him $2,500", and they would make that arbitrary assessment, and then it is up to the citizen to fight that, or you might say, take the burden of proof, if he refuses to make a return.

Mr. HUTCHESON. I know of no rule of law that will require them to make a joint return.

Mr. SHALLENBERGER. What I was talking about is this: Can they make an arbitrary assessment, and then require the taxpayer to show that it is not right?

Mr. HUTCHESON. I know of no State with such a rule of law.

Mr. HILL. If I may interrupt, in a number of the cases the Treasury Department did attempt to require the tax to be paid on a single income.

Mr. HUTCHESON. Yes; they attempted to do it, but that was struck down. As a matter of fact, they tried to collect it in that way, and that was the cause of the case's going up.

The taxpayer paid it, as a matter of fact, and sued back for it and recovered it in the Supreme Court of the United States. It was an affirmative action by the taxpayer to recover the tax paid.

Mr. EVANS. That is exactly the Malcolm case.

Mr. HUTCHESON. That is right, exactly, and also the Hopkins case and other cases, and the only case in which they failed to recover back was in the Robbins case where, as I say, they held the California wife did not have a vested interest in the property at that time.

The other decision I want to present is a Treasury decision no. 3138, which relates to all of the other States except Texas, that being the second opinion. Both of those opinions were rendered during the administration, I believe, of Mr. David F. Houston as Secretary of the Treasury, and during the period of Mr. Wilson's incumbency as President.

If I may read an excerpt from the opinion of the Attorney General in the opinion on Texas, which is the first opinion that the Attorney General ever rendered on this service——

Mr. HILL. What date was that?

Mr. HUTCHESON. This was August 24, 1920.

Mr. SHALLENBERGER. Who was Attorney General?

Mr. HUTCHESON. This is the opinion of Attorney General A. Mitchell Palmer, and he uses this language:

> The business of the firm [talking about the community partnership] generally is transacted in the name of the husband and he prosecutes and defends its suits with the same effect as if his partner were named in the case, and although community property has not all of the incidents of partnership property, it has many of them and is commonly spoken of as partnership property

Now, here is the exact thing on this point:

> And though the management and disposal of community property during marriage is usually given to the husband, this is said to be for reasons of public policy and social economy, and not on the ground that the husband has any greater interest in it than the wife. Section 4622 Vernons Civil Statute as amended in 1913 set forth above provides that the personal earnings of the wife, rents from her estate, interest on bonds and notes belonging to her and dividends on stock owned by her shall be under the control, management, and disposition of the wife alone. The court of Texas held in *Tannehill* v. *Tannehill* that such amendment did not change the character of rents from the wifes separate property so as to make them her separate property, and that they continued to belong to the community estate, and the husband was the owner of one-half of the same.

Now, that was before the case of *Arnold* v. *Leonard* had been decided by the Supreme Court of Texas.

May I say in passing there, if you carry this determination to its logical conclusion, here is what you would have had to do in Texas at some periods and may have to do again.

Frequently, it has been true in Texas over long periods of years that the husband has been given the control of separate properties

of the wife, exactly the same control that has been given over the community property.

Mr. SHALLENBERGER. You mean by statute.

Mr. HUTCHESON. Yes, by statute, which has been changed at the will of the legislature, and that statute has always been held to have nothing to do with the property rights of the wife.

Now, may I say that the Supreme Court of the United States in *Warburton* v. *White* used this language, speaking by Chief Justice White:

> It is a misconception of that system (that is, the community-property system) to suppose that power was vested in the husband to dispose of the community acquired during marriage, as if it was his own, therefore, by law the community property belongs solely to the husband. The conferring on the husband of the legal agency to administer and dispose of the property involved no negation of the community since common ownership would attach to the result of a sale of a property.

In other words, it is purely an administrative-agency proposition granted to the husband, as Judge Donworth said yesterday, because the wife presumably at least in prior days did not have quite the business experience and knowledge that the husband did, and somebody must manage the partnership. Who should it be? In those days, it seemed logical to be the husband. Tomorrow it may be the wife; in these days of transition, we may find the wife managing the husband's property, and I am not sure but that in some instances I know of, it would be a good plan.

Now, if I may say this further, after all, if this system is something you do not like, you can stay away from it. If it is something you do like, you can do one of two things: Either get your State legislature to adopt it, or if they won't do that, move to Texas.

There is absolutely no doubt we would welcome you, and I say that not facetiously, because our statute goes out of its way to say the same thing. They say in the statute if you want to come to Texas and let your wife own half of what you get from the day you come there and half of everything you acquire from that time on, just come down and we will welcome you, and we will apply the laws to you just exactly as we do to the man and woman who married in Texas.

We make no distinction in Texas, nor does any other State, between the husband and wife who are born and bred in the briar patch, and those who come there later and take advantage of the situation.

In addition to the matters we have just been discussing we have in Texas the rule established by our own constitution that you cannot enlarge the separate property of the wife, that what is prescribed in the constitution as hers is all that she can have as hers alone. So that if you can take away from her what she has in the community and you cannot give her any more than she has already got under the constitution, which is just what she brings into the marriage or acquires by gift devise or descent afterward, you will see that you are virtually stripping the wife of the very things that the common-law States have all gone out of their way to confer upon her.

Certainly it is true that if we must hark back to the basic principle underlying both of these laws, you will find that the fiction has been

increased by the common-law States and not by the community-law States.

You will find that in the common-law States, as you gentlemen from those States so well know, that the marriage conferred everything upon the husband, and even conferred the wife upon the husband; she was a chattel, and her properties and everything else went to her husband.

Of course, no enlightened common-law State is going to stay so far away from the community doctrine as not to give at least some right to the wife, and so her rights of separate ownership in rentals, and separate acquisitions has crept in by statute, or you might say by modified common law of the United States or of the States if there is such a thing, so that in all of the States she has property rights that are recognized and that are substantial.

As Mr. Dunbar said awhile ago, those common-law States not only recognize the wife there, but they recognize that any citizens from a community-property State may move into the common-law State and that she takes there her community-property right and treats it as her separate income from her separate property, just as though she had acquired it in that common-law State.

In other words, that would apply to the husband and wife from Washington, from Texas, or from any of the other community-property States.

Mr. HILL. You are using the words "common-law States" as synonymous with non-community-property States, and I assume you are using that as distinguished from the community-property State.

Mr. HUTCHESON. Yes; that is the distinctition I intend to make; and when I refer to the common-law States I mean those States other than the community-property States. We in the community-property States distinguish by calling the others the common-law States.

Mr. HILL. I understand that, but others reading the record might not understand it, and that is the reason I said you mean the non-community-property States.

Mr. HUTCHESON. Yes; that is corerct, the non-community-property States I am referring to when I say the common-law States.

Therefore, if we would give the husband and wife from Texas the absolute right to file separate returns when they remove from Texas to some other State, then the exodus would be the other way, and you would find that instead of the people from the common-law States coming to Texas, perhaps the people of Texas would be going to the common-law States to get their rights to file their returns separately.

Now, some reference has been made to the question of "enjoyment." In the brief filed in the Supreme Court of the United States at page 52 I see a reference to that same question, and if I may I would like to quote this brief extract for the record.

Mr. HILL. What brief is that?

Mr. HUTCHESON. This is the brief filed in the case of *Hopkins* v. *Bacon* in the United States Supreme Court, not the joint brief, but the separate brief which dealt only with the State laws, as contrasted with the joint brief.

The quotation from that brief is as follows:

> The petitioner (which was the Government) asserts that the enjoyment of community income is a taxing criterion, but does not attempt to define enjoyment. Respondent is at a loss as to what is meant by the term. It could hardly be said that a wife who owns community income and has the management and control of a substantial part of it, who is supported by means of it, who finds that its slow increase through savings and investment is providing for her old age, who at all times has the right to legal action to prevent its unwarranted dissipation, and who may devolve it upon her devisees or heirs at law, may not be taxed for it because she does not enjoy it.

We say that every conception of income and taxation is founded upon ownership, and that is what the sixteenth amendment in every instance relates back to. As Judge Dunworth pointed out yesterday you may let a little of the ownership out, but you have got a string tied to it. There is not a Supreme Court case that does not adhere to the doctrine of going back to the real ownership in the beginning, and holding that ownership as the test for the tax.

This is the language of the United States Supreme Court, which I quote from this brief:

> With respect to taxation, usually, if not necessarily, property and its ownership are inseparable. Taxes are assessed against persons on the property which they own, not on property which others own. *Home Savings Bank* v. *Des Moines* (205 U. S. 501).

This is our language, the wife in Texas owns and enjoys an equal share of community property and income.

In the case of *Hopkins* v. *Bacon*, the Supreme Court of the United States said:

> They provide, as usual in States having the community system, that the husband shall have the power of management and control, that he may deal with community property very much as though it were his own. In spite of this, however, it is settled in Texas that the wife has a present vested interest in such property. *Arnold* v. *Leonard*, 114 Tex. 535. Her interest is said to be equal to the husband.

Now, this is the Supreme Court speaking; not me. If something is equal, how can it be so unequal so that you can treat it as hers and not his.

Here is what the Supreme Court further says:

> It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other.

(If there is any doubt about "equal", perhaps, then, there is no doubt about "perfectly equivalent.")

It is further held in reference to the wife's interest that "if the husband as agent of the community acts in fraud of the wife's rights, she is not without remedy in the courts."

I say, gentlemen, that the Supreme Court of the United States in unmistakable words has said that you cannot tax control, and has said that the control amounts to nothing which you could tax, because it does not deprive her of equal rights, equivalent exactly to each other, and has held that if the husband acts in fraud of the wife's rights, she is not without remedy in the court.

Mr. SHALLENBERGER. I asked one of the gentlemen from Seattle yesterday if there was any difference in the definition of the different kinds of ownership.

You have discussed and illustrated the very broad control that the husband has in some community-property States over that property.

Now, in the State of Nebraska, I would never have control over the property of my wife at all, without she gives it to me, and that would seem to me to be a different sort of ownership which might carry with it a further interpretation of that. Have you anything to say about that point?

Mr. HUTCHESON. Yes; I will be glad to deal with that, Mr. Chairman. In the first place, she can confer that authority on you by power of attorney. That is unquestioned, so that she can do by a simple act of her own what the legislature has done for every husband and wife in every community-property State.

Mr. SHALLENBERGER. In my case she might not want to do it, but in your case she has it anyway.

Mr. HUTCHESON. Yes; but what is done by contract or by law, it is done, and it cannot be set aside except by volition of the parties in the common-law State, and it cannot be set aside at all in the community-property State. So that it is an element of control that is vested by the legislature, not by the party.

Now, as to the State of Nebraska and the State of Ohio, which is familiar to you gentleman from those States, as distinguished from the State of Washington, for illustration, you will find that in both of your States that you can make a partnership contract with the wife, and the Treasury Department has so ruled, and both the States of Ohio and Nebraska are in the list of noncommunity-property States, where those partnership contracts are recognized and given full force and effect.

Not only can you deed your wife something and she can deed you something, but you can enter into an agreement of partnership whereby your earnings and hers shall be joint income and can be separately returned in those States, and the Treasury Department recognizes that.

However, you can never do that in Texas. You cannot do anything more than the legislature has already done for you.

So, I would say in the first place, that completely, to my mind, offsets the proposition that you have not the control, because it would seem to me what one can do by contract, the State, if it has the constitutional power, can do for them by statute. That is the only difference in the two situations, as far as that question is concerned.

However, it is true that in Texas also the husband has no management of the separate property of the wife, but that is purely a matter of legislative control, and whenever they see fit to change it they can do so.

Mr. SHALLENBERGER. That is an interesting fact. You maintain, then, that this control of the wife, in a sense surrendered to the husband in the community-property State, is something that is only there by gift after all, and can be taken away from her.

Mr. HUTCHESON. Yes; in the sense that she submits herself to the jurisdiction of Texas when she marries or when she moves there. It is in a sense the adoption of a marital contract, or a marital rule or regulation. She comes into that State knowing she gets half

of his property and in return for that she allows him to manage it, because, after all, there has got to be a head to the business.

In one of the cases from Texas, they held that the husband could be agent for the wife's separate property and could go in and manage it for her and it would have the same results as a community agency; that it was merely inuring to her benefit, and he was merely acting for her. In the community property he is acting for her as far as her half is concerned and acting for himself as far as his half is concerned.

That is the holding in the case of *Warburton* v. *White*, and in that connection, may I say that in the case of *Arnett* v. *Reade* the very thing that seemed to be a little troublesome at first glance about the right of the husband to convey without the wife's joinder was what was involved. The husband had the right under the law of New Mexico to convey without the wife joining and they decided for reasons of policy they would make the wife join, and his grantees said no, the husband conveyed to me property which he had the right to convey before the statute was passed, and that was a vested right, and you cannot take it away from him.

The legislature said no, that element of control was a pure power of attorney we had conferred on the husband and he could convey it until we took it away from him; but, when we took it away and required his wife to join, then she had to join. That is no impairment of a constitutional right, but that is a pure element of control. That was the holding in *Arnett* v. *Reade*.

I believe you asked that very question, and I will say that in Texas the husband can convey the property. The legislature has said that is his power, and they leave the power of attorney where it is, but it is always subject to revocation by the legislature. It is not a property right, it is a method of doing business.

Further, may I say this to you: That in Texas, if the husband takes the property, even in his own name, he holds one half of it in trust for the wife, unless it is expressly provided that it is for his own separate use and benefit. In the case of the wife, if she takes a deed, she holds one half of it in trust for him unless it is expressly provided it is granted to her for her own separate use and benefit, and is a part of her own separate property, showing, therefore, that whether the title for management purposes is in the wife or in the husband, or in both, has nothing to do with the question of the right, and the legislature or the court can step in at any time and protect if it is being abused; or, as Mr. Justice Roberts, who wrote the opinion in *Hopkins* v. *Bacon*, said, that is a right she has at any time to step into court and protect herself if she needs to.

Now, if it pleases the committee, in a general way, I think I have discussed the major point that pertains to the Texas situation as it is in common with or distinguished from the other community-property States. Mr. Fullbright will be here next week, and I understand the committee will indulge us by allowing him also to speak in behalf of the Texas taxpayers.

I might say further, that in the opinion of the Attorney General that I quoted from, there is a brief summary of the laws of all of the community-property States, and when you run through that

summary, you will find that with the exception of California before its statutory amendment, that the Attorney General in substance indicates they are all more or less the same and there is no substantial difference between the right of the wife in one and in the other. She may have a little more power over one kind of property in one State, and a little less over it in another, but in the whole series of powers, she and her husband are on the same basis in all of the community-property States.

I might say to you we have prepared and would like the privilege of filing a brief which will be here Monday. It is being printed now, and I ask permission of the chairman of the committee if I may, to file that in behalf of the Texas taxpayers.

Mr. SHALLENBERGER. That permission is granted.

Mr. HUTCHESON. In that brief will appear the following extract which I would like to read into the record, which is on page 25 of the brief:

A typical ruling as to the effect of a partnership in a common-law State is reflected by the following quotations from the above notation.

(The notation referred to is vol. 1 of the Standard Federal Tax Service, published by the Commerce Clearing House, Inc., p. 1876.)

An oral partnership agreement between the taxpayers and their wives domiciled in Virginia by which each taxpayer gave to his wife one half of the capital in the business was held to be a valid partnership even though the wives did not contribute services or capital to the partnership. Though the apparent object of the reorganization of the partnership was to reduce surtaxes, is immaterial.

Mr. HILL. In that connection, can you supply for the record the Treasury decision holding along that line?

Mr. HUTCHESON. I will give you that case right now. Proceeding with the quotation, it says:

Citing *Phelps* v. *Commissioner* (13 B.T.A. 1248), acquiesced in by the Commissioner.

You will find illustrated in that group about 21 or 22 States of the 40 that already have had that exact question presented and ruled on by the Treasury Department.

Mr. HILL. So, the Treasury Department recognizes for tax purposes the right of the husband and wife in the non-community-property States to enter into partnership.

Mr. HUTCHESON. Yes; and regardless of the fact it may have been done for the sole purpose of avoiding surtaxes. They must be bona fide, of course, and not in fraud.

Mr. HILL. It is legal avoidance.

Mr. HUTCHESON. Yes; legal avoidance, and the Supreme Court of the United States has said legal avoidance is perfectly legal.

You have the right to do as you please with your property, and the fact it may benefit you in one respect while it takes away in another, if you see fit to give it up, you should not have to pay taxes on it.

The same thing is applicable when you move from some other State to Texas and give one half of the property to your wife, where she can will it away, and on her death it goes to her children if she does not will it, and she can take it away in case of divorce unless inequitable or something of that kind, and that she can at all times hold

you accountable for fraud on the community, and she can take the husband's estate if necessary to reimburse the community. It is inconceivable to my mind that the same right allowed in the noncommunity States where the contract is one between the parties, should not be recognized also where it is a matter of State legislation, which the Constitution of the United States has always recognized and protected in property rights.

As to the theory that there can be any difference between the due-process clause in the fourteenth amendment which was involved in the Schlesinger case and in the Hoeper case from Wisconsin and the due-process clause of the fifth amendment of the United States Constitution, I believe there can be no one successfully maintain there is any distinction. Due process at the hands of the Federal Government must always be the same as at the hands of the State government, and you cannot change the meaning of them.

Mr. Hill. The Supreme Court of the United States in the case of *Heiner* v. *Donnan*, in the two hundred and eighty-fifth United States report so held it specifically.

Mr. Hutcheson. Yes; and I am glad you called my attention to that. In that case, they said that the language of the two amendments, insofar as they related to due process had exactly the same effect, and it is only the impairment of the obligation of contract which is written into the one controlling the State, which is not written into the one controlling the Federal Government.

I think you gentlemen very much for the patience you have shown. We feel we have had our fair day in court, and we are very much indebted to you.

Mr. Dunbar. Mr. Chairman, I forgot to make one statement which I would like to insert here if I may.

Mr. Shallenberger. We will hear you.

Mr. Dunbar. In Louisiana a man and woman who are about to marry may make a contract that the community shall not apply, but if they marry without making the prenuptial agreement, the statute creates the partnership, so that there is a voluntary acquiescence in the application of the law by their failure to prevent its operation, which shows how close the law of contract and partnership is to the community-property law.

Mr. Shallenberger. The hearing will be resumed on Monday, and the first witness I have on my list is Mr. Fulbright, then there are others to follow. I am informed, Senator Connally, of Texas, wants to appear briefly before the committee, so that on Monday I will hear Senator Connally first, and then we will hear Mr. Fulbright and the other witnesses, following the program on the calendar.

We stand adjourned until Monday at 10 o'clock.

(Thereupon the subcommittee adjourned until Monday, May 7, 1934, at 10 a.m.)

COMMUNITY PROPERTY INCOME

MONDAY, MAY 7, 1934

House of Representatives,
Subcommittee of the Committee on Ways and Means,
Washington, D.C.

The subcommittee met at 10 a.m., Hon. Ashton C. Shallenberger (chairman) presiding.

Mr. Shallenberger. The committee will be in order. The first witness this morning is the Hon. William E. Evans, a Representative from California.

STATEMENT OF HON. WILLIAM E. EVANS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA AND A MEMBER OF THE COMMITTEE ON WAYS AND MEANS

Mr. Evans. Mr. Chairman and gentlemen of the committee: It would be presumptuous on my part to undertake to cover this question, in the light of the very able statements and arguments that have been made by the eminent gentlemen who have already spoken, and also those who will follow me.

In my limited experience of 8 years here, I think I can very consistently and truthfully say that I have not known of an issue that has been so adequately and fully explored and expounded as has this, and I am sure that whatever the views of any member of the committee may have been on the issues involved in this proposed legislation, the members have been very profoundly impressed with what has been already said in connection with this proposed legislation.

I do feel, however, that it would be proper for me to put in the record the exact status of the California community-property law.

California has had a community-property law throughout its existence as a State, and even before California was admitted into the union, like the other community-property States, it has a system of community property holding.

True, in California, as ultimately determined by the Supreme Court of the United States, the interest of the wife was held an interest in expectancy rather than a vested right; and, as has been pointed out to the committee on several occasions during these hearings, the legislature of the State of California, in 1927, amended our community-property law so as to create in the wife a vested, present, actual interest, equal to that of the husband, with the control in the husband.

I shall read for the purpose of the record that section of the law as amended in 1927 and as at present exists. Section 161 (a) of the Civil Code of the State of California establishes and fixes the right of the spouse in community property.

It is as follows:

The respective interests of the husband and wife in community property during continuance of the marraige relation are present, existing, and equal interests under the management and control of the husband as is provided in sections 172 and 172 (a) of the Civil Code. This section shall be construed as defining the prospective interests and rights of husband and wife in community property.

May it please the committee, the Supreme Court of the State of California has construed that section, subsequent to 1927, when it was enacted; and it has held in several cases, particularly in the case of *Siberell* v. *Siberell* (214 Calif. 767), that under that section of the code the wife in California acquired a full, unqualified half interest in the community property; that that interest was the highest quality of ownership known to the law.

It is conceded here by the proponents of this legislation that the basis of taxation of income is ownership of the property. If that is the criterion, then our courts have said unqualifiedly and without equivocation that the interest which the wife holds in community property in California is the highest quality of ownership known to the law.

The purpose of this bill, however, is, by legislative enactment of the United States Congress to say that is not true, that there is a so-called "handicap" in favor of the wife to the extent that she is not the unqualified owner, that she does not hold the highest quality of ownership known to the law, but she has a sort of ownership by which the husband can be compelled, through legislative enactment, to pay the tax on her property.

The author of the bill, in his opening statement here, said that through a sort of manipulation the husband and wife in the community-property States were given an unfair advantage over those husbands and wives in the non-community-property States.

Why, nothing could be further from the actual facts of the situation. Here is a system of ownership that even antedates the admission of any of these States into the Union, fifty or a hundred years, in some cases, before we ever heard of an income tax in this country.

It is a sort of ownership fixed by statute of the various States, and no one questions the right of the States to fix the character of ownership of property in those States.

Mr. SHALLENBERGER. If I do not disturb your line of argument, Mr. Evans, may I ask a question?

Do all of these States have a provision in their constitution that recognizes this principle of community property?

Mr. EVANS. May it please the Chairman, I cannot say as to all the States; in fact, I do not know whether I can say as to any State.

But I do not think we have any in our California constitution regarding this. I cannot be positive as to that, however. My impression is that we have not, that it is merely a statutory regulation. There may be something in the constitutions of some of the other States.

This section 161 (a), to which I have referred, says that the ownership is held accoraing to the terms of sections 172 and 172 (a).

Section 172 says [reading]:

The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate: *Provided, however*, That he cannot make a gift of such

community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

Under section 172 (a) the husband's agency to administer and control is hedged about with a number of very striking restrictions or qualifications.

It is an agency, as has been stated here, somewhat in the nature of a power of attorney, but with restrictions of management and control and, as I said a while ago, the Supreme Court of California, and, indeed, the United States Supreme Court, in various cases which have been cited here, have held to the very same effect, that this was absolute ownership.

Prior to the enactment of this section of the code, 161 (a), in 1927, in the case of *Robbins* v. *The United States*—I do not remember the exact title—and in 1926 the Supreme Court held that that character of ownership in California prior to the enactment of section 161 (a) was an expectancy and not a present, vested right.

Since that time and since the enactment of this section, in the case of *The United States* v. *Malcolm* (282 U.S., p. 792), the Supreme Court of the United States very distinctly held that this was complete ownership.

Mr. HILL. What is the citation of that case?

Mr. EVANS. 282 U.S., page 792.

By reason of the question asked by the chairman of one of the witnesses at the hearing on Saturday regarding the facts upon which the ruling of the Supreme Court was made in these various cases which are reported in 282 U.S., I am going to read the facts upon which the Malcolm case was based.

The statement of the facts is very short [reading]:

Robert K. Malcolm and Esther Jarret Malcolm are husband and wife and citizens of the United States. Since October 1, 1920, they have continuously maintained domicile in the State of California. During the year 1928, Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Co., a California corporation. Under the laws of the State of California, this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for Federal income tax purposes. Each reported one half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the return. It is admitted that all income taxes due from either husband or wife for the year 1928 have been fully paid, if, as a matter of law, they had a lawful right to make such separate returns under the provisions of paragraphs 11, 12, and 51 of the Revenue Act of 1928.

After the husband had filed his income-tax return for the calendar year 1928, as set out above, the commissioner, upon an audit and examination, determined by the husband alone, and an income tax paid thereon by him, instead of both that his return was incorrect in that the salary of $3,600 should have been reported husband and wife reporting it at $1,800 on each return. Accordingly, the commissioner determined against the husband a deficiency in income tax amounting to $11.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the commissioner. From a judgment for this amount in plaintiff's favor, the defendant has appealed.

Now, here, by way of interjection, may I say that instead of rendering a full opinion, as it did in previous cases which the Court had just decided, it simply referred to those cases as the reasoning for this rule:

The questions certified were as follows—

I hope the committee will get the significance of these answers. I will repeat:

The questions certified were as follows:

(1) Under the applicable provisions of the Revenue Act of 1928 must the entire community-property income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

That is exactly what this bill tries to do. That is the first question. The second question is:

(2) Has the wife, under paragraph 161 (a) of the civil code of California, such an interest in the community income that she should separately report and pay tax on one half of such income?

Now, here is the Court:

The first question certified is answered, "No."

That is, he need not.

The second question is answered, "Yes."

Now, what was the second question?

Has the wife, under paragraph 161 (a) of the civil code of California, such an interest in the community income that she should separately report and pay tax on one half of such income?

Mr. Shallenberger. The language that you read, "No", and "Yes", is that language of the court or is that your interpretation of the court's decision?

Mr. Evans. No; that is language of the court. Then it goes on to cite the case of *Poe* v. *Seaborn*, which was just decided; *Goodell* v. *Koch*, just decided by the court; and *Hopkins* v. *Bacon*, which, I believe, is the Texas case.

That is the present status of the law insofar as it obtains in California with reference to community income. Instead of this being a fiction or a quirk of the law, this system has come down to these community-property States from an experience and a history covering years that even antedate the admission of these States into the Union. It is utterly inconsistent and unfair, in my opinion, to claim now that this is simply a manipulation on the part of these States by which they gain an advantage. They do not. It is part of our system in these States that we have adhered to throughout the years.

Just illustrating what is in the minds of those who propose this legislation, I think of the little colloquy that took place on the floor of the House a few weeks ago when the revenue bill was under consideration. A member of the committee, Mr. Hill, was speaking on the bill. He was interrupted by a Member from a non-community-property State, who asked the question, how do you consider it fair to divide the salary of a Congressman from a community-property State, and allow the wife to pay income tax on one half of it and the husband to pay income tax on the other half, and in a noncommunity State compel the husband to pay a tax on the whole amount?

That is as far as the average individual goes in approaching this legislation. In order to answer that question, it would be necessary to go back and cover the whole ground as it was covered here a few days ago by the distinguished gentleman from the State of Washington and the other gentlemen who followed him. In order to get the whole picture, you have got to go back and see where this system of community ownership came from.

Mr. Shallenberger. Mr. Evans, it is your contention, as I gather from your remarks, that notwithstanding the fact that your State, for instance, as well as other community-property States, do not have this principle as a part of their constitution, this declared right of the wife to one half interest in the community estate, yet the construction of your courts throughout all the years that you have been a State has been such that it has become a rule of law as firmly fixed, and the people entitled to the benefits of it, as if it were a part of the constitution?

Mr. Evans. Exactly. I suppose it would be a proper subject for constitutional treatment, but it is not necessarily a subject of constitutional treatment.

Everyone will concede that the respective States have a perfect right to shape and conclude the character of ownership in property in those States. Nobody has ever questioned that.

The proponents of this legislation will not question that by legislative action the State can say that certain property will be community property or will be property held as tenants in common, or otherwise. That is a matter for the State to decide, and the States have decided.

These community-property States got their plan from Spain and from France hundreds of years ago.

May I say to the committee that at my request a rather exhaustive brief and argument has been prepared by an eminent member of the California bar, Mr. W. L. Nossaman, whose office is at 561 South Spring Street, Los Angeles, Calif., on this subject.

Some of the members of the committee have already seen this brief, I believe. In my opinion it is a most comprehensive and exhaustive treatment of the questions involved, and I am going to ask permission of the committee to insert the entire brief at the conclusion of my remarks, for the record.

Mr. Shallenberger. Without objection, the brief may be made a part of the gentleman's remarks.

Mr. Evans. Further, I do not feel I care to say anything.

Thank you, gentlemen.

Mr. Shallenberger. Thank you for your very informative statement, Mr. Evans.

(The brief referred to is as follows:)

MEMORANDUM ON H.R. 8396, RELATING TO TAXATION OF COMMUNITY INCOME

The proposed statute, H.R. 8396, reads as follows:

"A BILL Relating to the taxation of community property income

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse who has the management and control thereof under the law of the jurisdiction in which the marital community exists, and such spouse shall alone be entitled to the deductions and credits allowed under the internal revenue laws which are properly allocable to such property or income."

Summary of Argument

Understanding of the discussion following will be facilitated if a brief statement is made of the legal propositions sought to be established. These are as follows:

(1) Under the law of every community-property State the wife has a present, vested right, equal to that of her husband, in community property and income.

(2) It follows that the entire community income cannot be taxed to the husband for the following reasons:

(a) Under the due process clause of the fifth amendment to the United States Constitution, one person cannot be taxed upon income belonging to another.

(b) The same constitutional provision prohibits as arbitrary and unreasonable a classification based upon the community relation and not made applicable generally throughout the United States to persons who in respect of property or income stand in substantially similar relationships.

(3) The proposed statute violates the rule of territorial uniformity required in case of excise taxes by article I, section 8, clause 1, of the United States Constitution.

I—Nature of Community Property

As a basis for the consideration of the proposed legislation in its various aspects, it will be necessary first to inquire into the nature of community property and of the interests of the spouses therein. It would be impossible without writing a treatise upon the subject to enter into a minute discussion of the community-property laws in the various States, their similarities and differences.[1] Inevitably in the course of statutory development and judicial construction in eight States,[2] divergences in matters of detail have appeared. These divergences, it is believed, are immaterial for the present purpose since as will presently appear all of the community-property States are now in accord upon the fundamental proposition that the wife's interest in community property and therefore in community earnings of every nature is not a mere contingent or expectant interest but is present and vested, equal in every way to that of the husband.

Examination of the essential nature of the community-property system in the respect now under scrutiny is greatly simplified by the fact that within the last 4 years the highest Court of the Nation has handed down decisions in cases coming up from five community-property States, recognizing and defining the respective interests of spouses in community property in those States. As to another, New Mexico, we have a decision from the same source as late as 1911. For the law of the remaining two States, Idaho and Nevada, we have expressions equally clear and emphatic from their own supreme tribunals.

We will now examine briefly the community-property systems of the various States, taking up first those which have been dealt with recently by the Supreme Court of the United States.

Community-Property Law of Washington

On Novembef 24, 1930, the Supreme Court of the United States decided four cases arising from as many different community-property States, involving in each case the question of whether the husband was bound to report for income tax the entire community income or whether the spouses were entitled each to return one half thereof. The latter construction was upheld in each case. In the first of these, *Poe* v. *Seaborn* (282 U.S. 101, 75 L.Ed. 239), a case coming up from the State of Washington, the Court refers to the Washington statutes relating to this matter (now Remington's Revised Statutes, secs. 6890 to 6896) and says, page 110:

"These statutes provide that, save for property acquired by gift, bequest, devise, or inheritance, all property however acquired after marriage, by either husband or wife, or by both, is community property. On the death of either spouse his or her interest is subject to testamentary disposition, and failing that, it passes to the issue of the decedent and not to the surviving spouse. While the husband has the management and control of community personal property

[1] For a comparison of the various State laws in the respects mentioned. (See *Robbins* v. *United States*, 5 Fed. 2d. 690; D.C., Calif.). The Supreme Court of the United States, in *United States* v. *Robbins* (269 U.S. 315, 70 L.Ed. 285), disagreed with the specific conclusion of the learned district judge who wrote the opinion just referred to but this in no way detracts from the interest and value of the latter's general survey. Further on the nature and origin of community property generally. (See 31 C.J. 8, 9, 11; 5 R.C.L. 825, 826; *Garrozi* v. *Dastas*, 204 U.S. 64; 51 L.Ed. 369; *Bortle* v. *Osborne*, 155 Wash. 585, 67 A.L.R. 1152; see also Op. Atty. Gen., T.D. 3138, 4 C.B. 238 (1921).)

[2] Louisiana, Texas, New Mexico, Arizona, California, Nevada, Washington, and Idaho.

and like power of disposition thereof as of his separate personal property, this power is subject to restrictions which are inconsistent with denial of the wife's interest as coowner. The wife may borrow for community purposes and bind the community property. (*Fielding* v. *Ketler*, 86 Wash. 194, 149 Pac. 667.) Since the husband may not discharge his separate obligation out of community property, she may, suing alone, enjoin collection of his separate debt out of community property. (*Fidelity & D. Co.* v. *Clark*, 144 Wash. 520, 258 Pac. 35.) She may prevent his making substantial gifts out of community property without her consent. (*Parker* v. *Parker*, 121 Wash. 24, 207 Pac. 1062.) The community property is not liable for the husband's torts not committed in carrying on the business of the community. (*Schramm* v. *Steele*, 97 Wash. 309, 166 Pac. 634.)

"The books are full of expressions such as 'the personal property is just as much hers as his' (*Marston* v. *Rue*, 92 Wash. 129, 159 Pac. 111); 'her property right in it (an automobile) is as great as his' (92 Wash. 133); 'the title of one spouse * * * was a legal title as well as that of the other' (*Mabie* v. *Whittaker*, 10 Wash. 663, 39 Pac. 172).

"Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both. A description of the community system of Washington and of the rights of the spouses, and of the powers of the husband as manager, will be found in *Warburton* v. *White* (176 U.S. 484, 44 L.Ed. 555, 20 S.Ct. 404).

"The taxpayer contends that if the test of taxability under paragraphs 210 and 211 is ownership, it is clear that income of community property is owned by the community and that husband and wife have each a present, vested, one-half interest therein.

"The Commissioner contends, however, that we are here concerned not with mere names, nor even with mere technical legal titles; that calling the wife's interest vested is nothing to the purpose, because the husband has such broad powers of control and alienation, that while the community lasts, he is essentially the owner of the whole community property, and ought so to be considered for the purposes of paragraphs 210 and 211. He points out that as to personal property the husband may convey it, may make contracts affecting it, may do anything with it short of committing a fraud on his wife's rights. And though the wife must join in any sale of real estate, he asserts that the same is true, by virtue of statutes, in most States which do not have the community system. He asserts that control without accountability is indistinguishable from ownership, and that since the husband has this, quoad community property and income, the income is that 'of' the husband under paragraphs 210, 211, of the income-tax law.

"We think in view of the law of Washington above stated this contention is unsound. The community must act through an agent. This Court has said with respect to the community-property system (*Warburton* v. *White*, 176 U.S. 494, 44 L.Ed. 569, 20 S.Ct. 404) that 'property acquired during marriage with community finds became an acquet of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control, and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community.'

"In that case, it was held that such agency of the husband was neither a contract nor a property right vested in him, and that it was competent to the legislature which created the relation to alter it, to confer the agency on the wife alone, or to confer a joint agency on both spouses, if it saw fit, all without infringing any property right of the husband. (See also *Arnett* v. *Reade*, 220 U.S. 311 at 319, 55 L.Ed. 477, 481; 36 L.R.A. (N.S.) 1040; 31 S.Ct. 425.)

"The reasons for conferring such sweeping powers of management on the husband are not far to seek. Public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged. Lawsuits between them would tend to subvert the marital relation. The same policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions. The powers of partners, or of trustees of a spendthrift trust, furnish apt analogies.

"The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous

with legal remedy. The law's investituture of the husband with broad powers by no means negatives the wife's present interest as a coowner.

"We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife."

The court in the Seaborn case was announcing no new doctrine, since it had reached the same conclusions 31 years before in the leading case of *Warburton* v. *White* (176 U.S. 484, 44 L.Ed. 555), a case which fully recognizes the equal ownership of the spouses, with the husband as agent of the community.

The opinion in *Poe* v. *Seaborn* is quoted at length because it states principles applicable in all community-property States and because this summary obviates the necessity of minute examination of numerous decisions bearing upon this issue not only in Washington but in other States. For convenience and to facilitate the further examination of this topic by anyone interested in the various refinements of the doctrines above stated, a number of Washington cases, some of them cited by the Supreme Court in the Seaborn case, are referred to below.[3]

COMMUNITY-PROPERTY LAWS OF ARIZONA, TEXAS, AND LOUISIANA

Without repeating doctrines developed somewhat at length in *Poe* v. *Seaborn*, supra, it is sufficient to say that in *Goodell* v. *Koch* (282 U.S. 118, 75 L.Ed. 247), the Supreme Court applied the same principles in a community income case coming up from the State of Arizona; and in *Hopkins* v. *Bacon* (282 U.S. 122, 75 L.Ed. 249) and *Bender* v. *Pfaff* (282 U.S. 127, 75 L.Ed. 252) arising from Texas and Louisiana, respectively.

COMMUNITY-PROPERTY LAWS OF NEW MEXICO

The statute is found in New Mexico Statutes 1929, sections 68-401 to 68-410.

In *Arnett* v. *Reade* (220 U.S. 311, 55 L.Ed. 477, 1911), the Supreme Court held that a deed of the husband alone covering real estate acquired during coverture is ineffectual to convey community property even though acquired prior to the passage of the act. Distinctly repudiating the doctrine that the wife has a mere expectancy in community property, the Court reaffirms its conclusion in *Warburton* v. *White* (176 U.S. 484, 494) that control of the community property was given to the husband "not because he was the exclusive owner but because by law he was created the agent of community."

The doctrines briefly outlined in the Arnett case have been confirmed and amplified by the Supreme Court of New Mexico in the leading case of *Beals* v. *Ares* (25 N.M. 459), where the court (p. 499) after an exhaustive examination of authorities summarizes the law of New Mexico as follows:

"From the foregoing the following propositions may be accepted as settled: (1) That under the law in this jurisdiction the wife's interest in community property is equal with that of the husband; that while he is by statute made the agent of the community and given dominion and control over the community property during the continuance of the marriage relation, his interest in the property by reason of such fact is not superior to that of the wife."

To the like effect, see *Terry* v. *Humphreys* (27 N.M. 564, 1922), *Adams* v. *Blumenshine* (27 N.M. 643, 1922).

In *Baca* v. *Village of Belen* (30 N.M. 541, 1925), the court says, page 545:

"In this State we have the community-property system taken from the civil law, under which a wife's interest in property is quite different from the majority of the States in the Union, which have patterned their statutes after the common law, in which the wife has only a dower right in the property acquired by the husband after marrriage. In such property she has no present vested interest but only an expectancy. Here, however, she has a present existing vested interest, equal in all respects to the interest of the husband."

[3] Husband alone cannot convey community property or lease it for a term of more than 1 year. (*Itkin* v. *Jeffery* (126 Wash. 47, 1923), *Gunderson* v. *Gunderson* (25 Wash. 459, 1901), *Kaufman* v. *Perkins* (114 Wash. 40, 1921), *Northwest Lumber Co.* v. *Bloom* (135 Wash. 195, 1925), *Spreitzer* v. *Miller* (98 Wash. 601, 1917).)

On divorce community property undisposed of by decree becomes common property of former spouses. (*Ambrose* v. *Moore* (46 Wash. 463, 1907), *Harvey* v. *Pocock* (92 Wash. 625, 1916), *Schneider* v. *Biberger* (76 Wash. 504, 1913), *Barkley* v. *American Savings Bank & Trust Co.* (61 Wash. 415, 1911), *Graves* v. *Graves* (48 Wash. 664, 1908).)

On death of wife her community property vests in her heirs without probate. (*Scott* v. *Stanley* (149 Wash. 29, 1928).)

The interest of the wife as well as that of the husband is a vested legal interest. (*Mabie* v. *Whittaker* (10 Wash. 656, 1895), *Wampler* v. *Beinert* (125 Wash. 494, 1923), *Schramm* v. *Steele* (97 Wash. 309), *Marston* v. *Rue* (92 Wash. 129 1916), *Olive Co.* v. *Meek* (103 Wash. 467), *Bortle* v. *Osborne* (155 Wash. 585, 67 A.L.R. 1152, 1930), *Rucker* v. *Blair* (32 Fed. (2d) 222, C.C.A. 9, 1929).)

The husband cannot give away community property. *Marston* v. *Rue* (92 Wash. 129, 1916), *Steward* v. *Bank of Endicott* (82 Wash. 106, 1914), *Parker* v. *Parker*, (121 Wash. 24, 1922).)

COMMUNITY-PROPERTY LAWS OF IDAHO

The Idaho statute is found in Idaho Code of 1932, sections 31-903 to 31-914.

Without referring to the decisions at length it is sufficient to say that the following are the principal Idaho cases dealing with this subject and that they are in complete harmony with the conclusions of other courts that the interests of husband and wife in community property are, as stated in *Kohny* v. *Dunbar* (21 Ida. 258, 268, 39 L.R.A. (N.S.) 1107, 1912), "the same and equal." In that case the court, repudiating doctrines then prevalent in California to the effect that a wife's interest in community property was a mere expectancy, says, page 264:

"The only difference or distinction whatever the law has made between the husband and wife with reference to community property is that during the continuance of the community the husband is the managing agent, vested with absolute power of disposition of the property, and that the wife cannot sell or encumber such property except in specified instances. * * *

"The statute recognizes the husband and wife as equal partners in the community estate and it authorizes each to dispose of his or her half by will * * *. This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent, or inheritance, but as survivor of the marital community or partnership."

Speaking of the husband's right to manage, the court says:

"The statute, however, has given to the husband no better or higher title to the community than it has given to the wife * * *. The one-half interest which the wife receives from the community property upon the death of her husband comes to her in her own right by reason of the death of the community agent and her survival of the dissolution of the community partnership."

These doctrines are restated in *Ewald* v. *Hufton* (31 Idaho, 373, 1918), where the court says:

"Under these instances we think, following the case of *Kohny* v. *Dunbar*, *supra*, that it was the intention to make no distinction between husband and wife as to the degree, quantity, nature, or extent of the interest each has in the community property", citing authorities.

See also *Peterson* v. *Peterson* (35 Idaho, 470, 1922), *Muir* v. *City of Pocatello* (36 Idaho, 532, 1922), *Cibils* v. *First National Bank* (41 Idaho, 690), *Aker* v. *Aker* (52 Idaho, 713, 1933).

COMMUNITY-PROPERTY LAWS OF NEVADA

The Nevada statute is found in sections 3355 to 3372 of Nevada Compiled Laws, 1929.

The principal Nevada authority is *In re Williams* (40 Nev. 241, 1916), a decision written by the Hon. P. A. McCarran, the distinguished lawyer who is now junior Senator from Nevada and was then chief justice of its supreme court. In considering the question whether a surviving widow took as an heir her one half of the community property left by her husband, or whether it belonged to her absolutely in her own right not passing to her by succession or inheritance, the court upheld the later view, and expressly refused to follow California decisions announcing the former. Following *Warburton* v. *White* (176 U.S. 494, and the Idaho case of *Kohny* v. *Dunbar, supra*), the court says, page 260, that—

"Under statutes providing for the community system, there is no taking property from another, either by will or legal devolution. The property here going to appellant was property which she at all times under our statutory provisions 'held in common with her husband', hence there was no privilege to be taxed but rather a 'right' in property recognized by statutory prescription 'held' by her at all times 'in common with her husband.' "

COMMUNITY-PROPERTY LAWS OF CALIFORNIA

As already intimated, community-property doctrines formerly prevalent in California were not in harmony with those announced in the authorities above referred to, the conception being that the husband was the sole owner of community property and that the wife's interest therein was a mere expectancy, not a vested legal interest. (See *Stewart* v. *Stewart*, 204 Calif. 546, 1928, where the earlier decisions are reviewed.) It is to be noted that even in California, starting with the conception that the wife's only substantial interest was her right to one half at her husband's death, the course of statutory development has been

in the direction of a continual lessening of the husband's authority and interest and a corresponding augmentation of the wife's.[4]

This development culminated in section 161a of the Civil Code, added in 1927 (quoted, note 4), providing that the interests of the spouses in community property are present, existing, and equal. That doctrines formerly prevalent in California are now obsolete as fully recognized by the Supreme Court of the United States in *United States* v. *Malcoln* (282 U.S. 792, 75 L.Ed. 714, 1931), where the court applied the rule of *Poe* v. *Seaborn* to community income earned in California after 1927.

No important body of judicial opinion has developed in California since the radical change effected by the 1927 amendment. Concerning it, however, the California Supreme Court says, in *Siberell* v. *Siberell* (214 Calif. 767, 772, 1932):

"Lastly, in 1927, section 161a was added to the Civil Code investing her with full title to one half thereof, ceding alone to the husband the management and control thereof."

See also *Cutting* v. *Bryan* (206 Calif. 254, 259).

We have completed our review of the community-property system of the various States insofar as the matter now at issue is concerned. Disregarding minor divergences, the eight community-property States are unanimous in declaring that the wife has a vested interest in community property equal in all respects to that of her husband; that the duty of management placed upon the husband implies no right of ownership superior to that of the wife but is a mere agency, for a breach of whose fiduciary obligations the courts afford the wife appropriate remedy.

The conclusions reached justify, it is believed, the space required for presentation of the considerations upon which they rest, especially when it is borne in mind that the entire case of the community-property States in objecting to the statute now proposed rests upon those conclusions. Incidentally it may be remarked and it will not be disputed that the entire issue so far as the matters hereinabove discussed is concerned depends upon State law. *Buchser* v. *Buchser* (231 U.S. 157, 58 L.Ed. 166, 1913, *Poe* v. *Seaborn*, and *Warburton* v. *White, supra*.

This necessary preliminary disposed of, we shall inquire whether the proposed statute is within the constitutional authority of Congress.

II.—Taxation of Community Income to the Husband Is Arbitrary and Confiscatory, Depriving Him and the Marital Community of Property without Due Process of Law in Violation of the Fifth Amendment to the Federal Constitution

We shall consider this under two subdivisions:

(a) One person may not be taxed upon income belonging to another; and similarly, one person's income may not constitute in whole or in part the standard or basis by which the amount of tax on another's may be measured.

(b) A classification based upon the community-property relationship, not made applicable to persons who in respect of property or income stand in similar relationships, is unreasonable.

Taking up these points in order:

(a) No power to tax one person on income belonging to another or to use another's income as the standard by which the amount of tax is measurable.

In *Hoeper* v. *Tax Commission* (284 U.S. 206, 76 L.Ed. 248, 78 A.L.R. 352 (1931)) the Supreme Court of the United States had before it a Wisconsin statute providing:

"Sec. 71.05. In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under 18 years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family. * * *

"Sec. 71.09. Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income."

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[4] 1891 amendment to C.C. 172; 1917 amendment to C.C. 137; C.C. 172a added 1917; 1923 amendments to C.C. 1401, 1402; C.C. 161a added 1927. This reads as follows:

"Interests in community property: The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the civil code. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

For historical review of California community-property laws, see Calif. Jur. 1930 Supp., pp. 14-31.

From a decision of the Supreme Court of Wisconsin upholding the tax, the taxpayer Hoeper appealed, asserting that the statute deprived him of property without due process of law and of the equal protection of the law. His contention is stated by the Supreme Court (p. 213) as follows:

"The appellant says that what the State has done is to assess and collect from him a tax based in part upon the income received by his wife and that such exaction is arbitrary and discriminatory and consequently violative of the constitutional guaranties."

The Court discusses the wife's property rights at common law, pointing out that under that system her earnings and income are her husband's; that he may dispose of them at will and is liable for her debts. Wisconsin statutes are then referred to abolishing the husband's ownership and control of the wife's property and declaring that women have the same rights as men in freedom of contract, holding and conveying property and in all other respects; providing further that a wife's personal property and real estate and its rents, issues, and profits shall be her sole and separate property; that she may convey, devise, or bequeath her property as if she were unmarried and her husband has no right of disposal thereof nor is it liable for his debts; that the individual earnings of a married woman are her separate property.

After summarizing the above and other related provisions of Wisconsin law, the Court says (p. 215):

"Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the State has power by an income-tax law to measure his tax, not by his own income but, in part, by that of another. To the problem thus stated, what was said in *Knowlton* v. *Moore* (178 U.S. 41, 77; 44 L.Ed. 969, 984; 20 S.Ct. 747) is apposite:

"'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income." (Compare *Nichols* v. *Coolidge*, 247 U.S. 531, 540; 71 L.Ed. 1184, 1192; 52 A.L.R. 1081; 47 S.Ct. 719.)

The Court then considers and rejects two grounds thought by the Supreme Court of Wisconsin sufficient to remove constitutional objections to the statute. These were, first, that the provisions in question are necessary to prevent frauds and evasions of the tax by married persons, and, second, that the imposition of a tax is a regulation of marriage. The first of these arguments the Court answers by quoting from its decision in *Schlesinger* v. *Wisconsin* (270 U.S. 230; 70 L.Ed. 557) as follows (p. 217):

"That is to say, A may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against B. Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The second argument, that based on regulation of the marital relation, is likewise rejected, but as this argument even if sound could be applied only in favor of State and not Federal regulation—that relation being a matter within the exclusive domain of the States—the Court's reasoning upon this point need not be further referred to.

The Court (p. 216) refers to the fact that under the Wisconsin law the income of the wife does not at any moment or to any extent become the property of the husband and that he never has any title to it or controls any part of it. Proponents of H.R. 8396 may attempt to extract comfort from this dictum, but it will be seen that with the exception of the Court's reference to "control" on the part of the husband, the expression in question applies as fully to the wife's interest in community as to her interest in separate property. The Court was

evidently using the term "control" in the sense of such an authority over the income in question as would enable the husband to use it for his own benefit.

This authority, as we have seen, the Supreme Court in the case of community income has itself negatived, recognizing in the Seaborn case that control is not the determining factor, and pointing out (p. 113):

"The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner."

Here is a clear recognition as explicit as in the Hoeper case itself that liability for income taxes is dependent upon actual ownership of the income upon which such taxes are based and that the court will not be diverted, through consideration of any such extraneous circumstance as the power to control the fund, from determining where the actual ownership, with corresponding liability for taxes, lies.

Schlesinger v. *Wisconsin* (270 U.S. 230, 70 L.Ed. 557 (1926)), referred to in the Hoeper case, involved the validity of a Wisconsin statute creating a conclusive presumption that every voluntary transfer made within 6 years prior to the death of the grantor of a material part of his estate shall be construed to have been made in contemplation of death, subject to inheritance taxes. In holding this statute invalid under the fourteenth amendment, the Court says that the attempted discrimination between gifts inter vivos made within 6 years of death and those made prior thereto is wholly arbitrary. Upon the point urged in support of the statute that it was designed to prevent evasion of inheritance taxes, the Court uses the language above quoted from the Hoeper decision, and continues (p. 240):

"A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid."

The principle of this case goes to the heart of the present problem, in that here, as there, a classification not resting on a reasonable distinction—between community earnings and other earnings similar in their essential characteristics—is sought to be made. This point will be again referred to later.

The other authority particularly relied on by the Supreme Court in the Hoeper case is *Nichols* v. *Coolidge* (274 U.S. 531, 71 L.Ed. 1184 (1927)), holding invalid as arbitrary and capricious and violative of the fifth amendment that part of section 402 c of the Revenue Act of 1919 which required that there should be included in the gross estate of a decedent for purposes of estate taxation the value of property transferred by decedent prior to its passage where the conveyance was made in contemplation of or intended to take effect in possession or enjoyment at death. The Court says (p. 540):

"The mere desire to equalize taxation cannot justify a burden on something not within congressional power. The language of the statute is not consistent with the idea that it utilizes the gross estate merely to measure a proper charge upon the transfer by death. (See *Llewellyn* v. *Frick*, supra.) *Frick* v. *Pennsylvania* (268 U.S. 473, 494, 69 L.Ed. 1058, 1064, 42 A.L.R. 316, 45 Sup. Ct. Rep. 603) rejected a somewhat similar claim, and said: 'Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution.' This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail."

In the instant case the amount of the tax payable by a husband depends not on his own income but on that income swollen by the income of another person, the result of which is to bring both the joint income of the community and the income of the husband into higher brackets. Does not this constitute measuring the income which the Government has power to tax by a standard ignoring that limit and basing it upon income which the Government has no power to tax, contrary to the principle of the Nichols case?

In *Heiner* v. *Donnan* (285 U.S. 312, 76 L.Ed. 772 (1932)) the Court held invalid the clause in section 302 c of the 1926 Revenue Act providing in effect that a transfer without valuable consideration made within 2 years prior to death of a decedent shall be conclusively presumed to have been made in contemplation of death. Referring to the Schlesinger case, the Court says:

"Nor is it material that the fourteenth amendment was involved in the Schlesinger case instead of the fifth amendment as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge* v. *Long* (282 U.S. 582, 75 L.Ed. 562). That a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall within the due process of law clause of the fifth amendment is settled."

Continuing, after pointing out that under the statute the value of the gift when made is to be ignored and its value arbitrarily fixed as of the date of the donor's death, the result being that upon those who succeed to the decedent's estate there is imposed the burden of a tax measured in part by property comprising no portion of the estate and from which the estate derives no benefit, the Court says (p. 327):

"Plainly this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and a denial of the due process of law. Such an exaction is not taxation but spoliation. It is not taxation that Government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the Government from his own gains and of his own property. *United States* v. *Baltimore & O. R. Co.* (17 Wall. 322, 326, 21 L.Ed. 597, 599)."

After stating that the result of the tax in question is to put upon an estate the burden of a tax measured in part by the value of property never owned by it or connected with the death which brought it into existence, the Court continues (p. 328):

"Such a statute is more arbitrary and less defensible against attack than one imposing arbitrarily retroactive taxes, which this Court has decided to be in clear violation of the fifth amendment. As said by Judge Learned Hand in *Frew* v. *Bowers* (C.C.A. 2d) 12 F. (2d) 625, 630): 'Such a law is far more capricious than merely retroactive taxes. Those do, indeed, impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice.'

"To sustain the validity of this irrebuttable presumption it is argued, with apparent conviction, that under the prima facie presumption originally in force there had been a loss of revenue, and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this Court in the Schlesinger case (270 U.S., p. 240, 70 L.Ed. 564, 43 A.L.R. 1224, 46 S.Ct. 260) and Hoeper case (284 U.S., p. 217, ante, 248, 52 S.Ct. 120), cases involving similar situations. Both emphatically declared that such rights were superior to this supposed necessity."

The Court's statement that when tax burdens are distributed in accordance with another's wealth a grievous injustice is inflicted applies fully to the tax now proposed, since the burden of taxation in respect of income allocable to and in legal theory earned and owned by the wife in community-property States is to be thrown in its entirety upon one member of that community, whose substantial rights in respect of such income are no greater than those of the other member.

In *Coolidge* v. *Long* (282 U.S. 582, 75 L.Ed. 562 (1931)), cited above, the Court, following *Nichols* v. *Coolidge*, held violative of the fourteenth amendment an inheritance-tax act of Massachusetts purporting to tax property which had passed under an irrevocable trust deed prior to its enactment.

To substantially the same effect as the Long case is *Levy* v. *Wardell* (258 U.S. 542, 66 L.Ed. 758 (1922)), cited by the Court in the Long case. (See also *Shwab* v. *Doyle*, 258 U.S. 529, 66 L.Ed. 747; and *Union Trust Co.* v. *Wardell*, 258 U.S. 537, 66 L.Ed. 753 (1922).)

In *Hartman* v. *Greenhow* (102 U.S. 672, 685, 26 L.Ed. 271, 276 (1881)), the Court says:

And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another.

In *Shellabarger* v. *Commissioner* (38 Fed. (2d) 566, 8 Am. Fed. Tax Rept. 10328 (C.C.A. 7, 1930)), it was held that where a beneficiary of a trust agreed, for consideration, to make a specified payment out of the net income of the trust to another person, she was not liable for income tax under 1924 Revenue Act upon part paid out in accordance with such agreement. The basis of the decision is that the beneficiary receiving the income "* * * was but an instrumentality or agency for receiving and conveying to Georgia and the bank their contracted proportion of the net income. * * * As the fund was paid over to Maud the interest of Georgia and the bank immediately attached and Maud became in equity a trustee for the benefit of Georgia and the bank. * * * In any event the valid agreement to pay, as received, half of the income of the trusts conferred an equitable lien on the fund when it came into existence (*Ingersoll* v. *Coram*, 211 U.S. 335, 53 L.Ed. 208). While the whole of the net income from the trusts was physically received by Maud, the half did not accrue to her as income but on the instant of receiving it she held it in trust for Georgia and the bank. * * *"

So in community-property States the husband "physically receives" community income, but it "does not accrue to him as his income" except as to his community half. (See also *Rosenwald* v. *Commissioner*, 33 Fed. (2d) 423, 7 Am. Fed. Tax. Rept. 8818 (C.C.A. 7, 1929; certiorari denied, 280 U.S. 599.)

It is believed that the authorities above cited show (1) that a tax cannot be levied upon one person in respect of another's property or income, and (2) that one person's property or income cannot be used, in whole or in part, as the standard by which another's tax is fixed.

(b) A classification based upon the community-property relationship not made applicable to persons who in respect of property or income stand in similar relationships is discriminatory and unreasonable.

That a statute may be so discriminatory as to violate the due-process clause of the fifth amendment, though at one time questioned (*McCray* v. *United States*, 195 U.S. 27, 62; 49 L.Ed. 78, 98) is now well settled. (In addition to the cases already cited, see *Brushaber* v. *Union Pac. Rd. Co.*, 240 U.S. 1, 24; 60 L.Ed. 493, 504; *Nat'l. Life Ins. Co.* v. *U.S.*, 277 U.S. 508, 72 L.Ed. 968; *Blodgett* v. *Holden*, 275 U.S. 142, 72 L.Ed. 206; *Untermeyer* v. *Anderson*, 276 U.S. 440, 72 L.Ed. 991; *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 69 L.Ed. 703; and *Evans* v. *Gore*, 253 U.S. 245, 64 L.Ed. 887.)

The three cases last cited and the Brushaber case deal with the extent, rather than the limitations, of congressional power to select and classify objects of taxation, while each of the other cases is particularly concerned with limitations upon the power of Congress, held in those instances to have been transgressed. The principle applied or recognized in all of these authorities is that arbitrary enactments and those establishing classifications based upon no reasonable distinction are invalid.

This principle has been applied for example in the case of a gift tax attempted to be imposed on a gift completed before its passage (*Blodgett* v. *Holden*, 275 U.S. 142, 72 L.Ed. 206; *Untermeyer* v. *Anderson*, 276 U.S. 440, 72 L.Ed. 645); to the Federal estate-tax law as applied to a similar transaction (*Nichols* v. *Coolidge*, 274 U.S. 531, 71 L.Ed. 1184); to a statute making conclusive a presumption that a transfer made 2 years prior to death was in contemplation of death (*Heiner* v. *Donnan*, 285 U.S. 312, 76 L.Ed. 772); to a Federal estate-tax act if construed retroactively so as to tax transfers made prior to its passage (*Levy* v. *Wardell*, 258 U.S. 542, 66 L.Ed. 758, and its companion cases, *Shwab* v. *Doyle*, 258 U.S. 529, 66 L.Ed. 747, and *Union Trust Co.* v. *Wardell*, 258 U.S. 547, 66 L.Ed. 753); to a statute whose effect was to deny to a life-insurance company holding exempt securities a deduction allowed those not holding such securities (*National Life Ins. Co.* v. *United States*, 277 U.S. 508, 72 L.Ed. 968).

In the case last cited, the Court says (p. 520):

"The suggestion that as Congress may or may not grant deductions from gross income at pleasure, it can deny to one and give to another is specious but unsound."

The act now under scrutiny does propose to "deny to one and give to another" in respects already pointed out and in the following:

The discrimination complained of manifests itself in two ways:

(1) It discriminates against spouses in community-property States, in that it denies them the right to form partnerships and obtain the benefits, for tax purposes, of a division of income.

(2) It is discriminatory as against such spouses as singling them out for higher taxation based on combined income while not taxing in a similar manner other relationships similar in their essential characteristics.

One discriminatory feature of the proposed act has been heretofore mentioned, namely, that husbands and husbands and wives jointly in community-property States are discriminated against in that under the proposed measure their combined community earnings are required to be pooled and thereby subjected to higher taxes through being placed in higher brackets. This result is inseparably connected with the arbitrary features of the proposed bill in proposing to tax one person upon income belonging to another.

The discrimination to which attention is now directed is of a more immediate and specific sort; namely, it denies to spouses in community-property States privileges accorded as of right to spouses in other States.

Taking up the above points in order:

(1) Denial of right to tax reductions available through partnerships in which husband and wife are members.

The Treasury Department has long recognized the right of husband and wife, where permitted by State law, to become partners and be liable for income taxes upon the returns from the partnership in the proportion of their respective interests. (See general counsel's memorandum 3421, cumulative bul. VII-1, p. 106 (District of Columbia); *MacPherson* v. *Commissioner*, 19 B.T.A. 651 (Mass.); *Kammerdiner* v. *Commissioner*, 25 B.T.A. 495 (Calif.); memorandum of solicitor of internal revenue, SM 2964, cumulative bul. IV-1, p. 171 (Colo.).)

Phelps v. *Commissioner* (13 B.T.A. 1248 (Virginia)) rule applied though the board finds that the object of the formation of the partnership was for the purpose of reducing income taxes. (See numerous Treasury Department rulings and decisions of the Board of Tax Appeals collected in vol. 1, C.C.H. Fed. Tax Serv. 1934, par. 1169.)

Now the community relationship is in many respects analogous to a partnership. The Supreme Court of Washington in *Marston* v. *Rue* (92 Wash. 129) says that the husband "is, so to speak, only the head of a firm." (See discussion of the community system as one of marital partnership and the distinctions drawn between this relationship and ordinary partnerships in 31 C.J. 9; see also *Bortle* v. *Osborne*, 155 Wash. 585, 67 A.L.R. 1152) where the Court says "* * * A marital community is in no sense a corporation; neither is it a partnership, though the community of property between the spouses is, in a restricted sense, a partnership between the husband and wife"; see also *Warburton* v. *White*, 176 U.S. 484, 44 L.Ed. 555, referring to certain early Washington cases.)

However applicable the partnership analogy may be, the following result is manifest. In Massachusetts or Colorado or in any other State where husband and wife are at liberty to contract, they may form a partnership and divide for income-tax purposes the returns from it. In community-property States this right will be denied. We have then the singular result that voluntary partnerships, even those created for the express purpose of reducing taxes, are entitled to income-tax advantages denied spouses under the quasi partnership imposed by law in community-property States.

(2) Singling out spouses in community-property States for higher taxation based on combined income, while not taxing in a similar manner other relationships essentially similar.

Insofar as the ownership of property is concerned, the spouses in community relationship occupy a position not dissimilar to tenants in common whose right to divide for income-tax purposes income from jointly owned property is not and cannot be questioned under existing law (Office Dec. 425, 2 C.B. 198, II C.C.H. 1934, St. Fed. Tax Serv., par. 1847). It is not clear what essential difference in any respect here important exists in respect, for example, of real estate owned by spouses as tenants in common in a common-law State and real estate owned by them as community property in a community-property State. In each case they have a vested, legal interest, equal in case of community property, and which may be equal in case of tenancy in common. The fact of the husband's management in the former case being immaterial, there seems to be, for the present purpose, no valid distinguishing circumstance.

The points just discussed are involved in another aspect, in the point which will be considered under III, post; namely, whether the excises imposed under the proposed statute are uniform throughout the United States.

Before proceeding with that topic, a proper survey of the subject at hand requires that notice be taken of such authorities as may conceivably be thought to point to conclusions different from those reached upon the points above discussed. These authorities, so far as they have come to the writer's attention, will be noticed briefly.

In *Corliss* v. *Bowers* (281 U.S. 376, 74 L.Ed. 916 (1930)), it was held that the grantor of a revocable trust may constitutionally be assessed for income tax in respect of income from the trust fund though the income was actually paid to a third person, the beneficiary. The reasons for this holding are enlightening, as showing the distinction between the case there considered and that presented in case of community property. The Court says (p. 378):

"Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate, it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

The community-property cases above cited show conclusively that community income is not "subject to a man's unfettered command" and that he is not "free to enjoy it at his option." Under doctrines universally prevailing in community property, he has not that power of absolute disposition which the Supreme Court indicates is prerequisite to enable the Government to tax him on account of it.

In *Lucas* v. *Earl* (281 U.S. 111; 74 L.Ed. 731 (1930)), the Court held that the entire earnings of a husband are, for income-tax purposes, to be treated as his, notwithstanding he and his wife had entered into a contract whereby they agreed that whatever might be acquired by either of them during the marriage should be received and owned by them as joint tenants. The Court says (p. 114):

"There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts, however skillfully devised, to prevent the salary when paid from vesting even for a second in the man who earned it."

This reasoning indicates that the basis of the decision is the fact that for a moment of time the salary when earned was that of the husband. This construction is confirmed and the distinction we wish to make is pointed out by the Court itself in *Poe* v. *Seaborn* (282 U.S. 101), where, referring to the Earl case, the Court says (p. 117):

"The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community."

Similar to *Lucas* v. *Earl* is *Burnet* v. *Leininger* (285 U.S. 136; 76 L.Ed. 655 (1932)), where an agreement between a husband and wife to the effect that the wife was a full partner with him in his interest in a certain partnership and that each should pay a tax on one half of the income attributable to the partnership interest was held ineffective to divest the husband of liability in respect of income tax upon his entire share of the partnership earnings. It should be noted, and the Court distinctly points out, that the wife was not a member of the partnership.

The Court distinguishes the Hoeper case as follows:

"A different situation was presented in *Hoeper* v. *Tax Commission* (decided Nov. 30, 1931; 284 U.S. 206; *ante*, 248, 78 A.L.R. 346; 52 S.Ct. 120), where the question related to the earnings of the wife and the income which she received from her separate estate. *For that which thus belonged to her the Court held that her husband could not be taxed.* In the instant case, the right of the wife was derived from the agreement with her husband and rested upon the distributive share which he had, and continued to have, as a member of the partnership."

Since under community-property doctrines half the community income belongs to the wife, and since the wife's property rights (as distinguished from the immaterial feature of management) are not substantially different in separate and community property, the distinction indicated by the language above italicized is fully applicable to the instant situation.

In *Burnet* v. *Wells* (289 U.S. 670; 77 L.Ed. 1439 (1933)), the Court held that income from irrevocable trusts for the payment of premiums on the settlor's policies of life insurance for the benefit of relatives was taxable to the creator of the trust to the extent to which the income had been applied to the maintenance of such insurance. The Court refers to the Hoeper case only by reference to the distinction of that case made in *Reinecke* v. *Smith* (289 U.S. 172; 77 L.Ed. 1109 (1932)), where income from a trust was held taxable to the grantor under 219g of the 1924 act, though the trust was revocable only with the consent of the trustee, the latter not being deemed a beneficiary of the trust within the meaning of that section. The Court in the Reinecke case, in turn, distinguishes the Hoeper case by saying that—

"There the attempt was to tax income arising from property always owned by one other than the taxpayer, who had never had title to or control over either the property or the income from it."

Manifestly the Reinecke case contains nothing antagonistic to the doctrines we are seeking to uphold, nor does the Wells case when its grounds are examined. The Court's conclusion is put upon the ground that Wells, in creating these trusts, was devoting his income (p. 680)—

"to the preservation of his own contracts, to the protection of an interest which he wished to keep alive. * * * In effect he said to the trustee that for the rest of his life he would dedicate a part of his income to the preservation of these contracts, so much did they mean for his peace of mind and happiness. Income permanently applied by the act of the taxpayer to the maintenance of contracts of insurance made in his name for the support of his dependents is income used for his benefit in such a sense and to such a degree that there is nothing arbitrary or tyrannical in taxing it as his."

Very significant is the statement that the income in question was permanently applied "by the act of the taxpayer" to the maintenance of the contracts. Amplifying the same thought, the Court says (p. 681):

"Trusts for the preservation of policies of insurance involve a continuous exercise by the settlor of a power to direct the application of the income along predetermined channels. In this they are to be distinguished from trusts where the income of a fund, though payable to wife or kin, may be expended by the beneficiaries without restraint, may be given away or squandered, the founder of the trust doing nothing to impose his will upon the use."

Although the Court properly disclaims any intent to lay down rules applicable to the cases last mentioned, the line of demarcation actually drawn is nevertheless clear. The Court was dealing with a case where the application of the income had been "permanently applied by the act of the taxpayer". In the situation we are considering the income is permanently applied by law. In our case the husband can do nothing "to impose his will upon the use" of the income insofar as diverting it from the purposes of the community and failing to accord full recognition to his wife's equal interest are concerned. Neither in its reference to the Hoeper case nor in the doctrines actually announced does the Wells case manifest any intent to depart from the rule laid down in the former. Properly analyzed, the Wells case is an authority against, rather than for, the validity of the tax now sought to be imposed.

III.—The Act Proposed Violates the Constitutional Requirement That Excises Must be Uniform Throughout the United States

The applicable constitutional provision is article I, section 8, clause 1:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

That income taxes are excise taxes is not open to question (*Brushaber* v. *Union Pac. Rd. Co.*, 240 U.S. 1, 60 L.Ed. 493; *Pollock* v. *Farmers Loan & Trust Co.*, 158 U.S. 601, 635, 39 L.Ed. 1108, 1125; *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 150, 55 L.Ed. 389, 413; *Springer* v. *United States*, 102 U.S. 586, 26 L.Ed. 253).

Such taxes are required to operate with geographical uniformity (*Billings* v. *United States*, 232 U.S. 261, 58 L.Ed. 596; *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 69 L.Ed. 703; *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 150; 55 L.Ed. 389, 413; *Poe* v. *Seaborn*, 282 U.S. 101, 75 L.Ed. 239; *Knowlton* v. *Moore*, 178 U.S. 41, 44 L.Ed. 969; *La Belle Iron Works* v. *United States*, 256 U.S. 377, 65 L.Ed. 998; *Edye* v. *Robertson*, 112 U.S. 580, 28 L.Ed. 798; *Bromley* v. *McCaughn*, 280 U.S. 124, 74 L.Ed. 226; *Phillips* v. *Commissioner*, 283 U.S. 589, 75 L.Ed. 1289; *James Clark Distilling Co.* v. *Western Maryland Rd. Co.*, 242 U.S. 311, 61 L.Ed. 326; *Florida* v. *Mellon*, 273 U.S. 12, 71 L.Ed. 511).

The proposed statute under consideration does not operate with geographical uniformity. It is in terms directed only at States having community-property laws; that is, 8 out of the 48. It is no answer to say that the statute applies to whatever States may now or hereafter come within the named category of community-property States since this leaves undisposed of the fact that the community relationship is singled out for a special and discriminatory type of legis-

lation not made applicable to other relationships essentially indistinguishable from it.

The language of the Supreme Court in *Knowlton* v. *Moore* (178 U.S. 41, 89; 44 L.Ed. 969, 988) is applicable in this connection:

"Giving to the term uniformity as applied to duties, imposts, and excises a geographical significance likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts, or excises upon a particular subject in one State and a different duty, impost, or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes."

Discussing the same point the Court (p. 84) states a contention of counsel respecting this matter which the Court later in its opinion upholds, as follows:

"The words 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say that wherever a subject is taxed anywhere the same must be taxed everywhere throughout the United States and at the same rate."

The statute now proposed does not make operative "the same plan and the same method * * * throughout the United States." It does not tax the same subject "everywhere throughout the United States." Since it will run up into higher brackets, community as compared with separate income, it does not tax the same subject "at the same rate." It does the very thing which the Supreme Court in the first extract above quoted says cannot be done, namely, it levies an excise "upon a particular subject in one State and a different duty, import, or excise on the same subject in another."

In terms directed only at a portion of the union—a feature which it is believed will not be found in any other excise statute—it is for that reason prima facie at variance with the requirement of geographical uniformity. But aside from this, it is at variance with that requirement for the further reason, not patent upon the face of the statute itself, that it does not tax in the same manner throughout the United States income arising from or under relationships not substantially dissimilar.

We are not contending that excises imposed by Congress must be of such a character that they may be actually levied throughout the Union. The only requirement of the Constitution is that they must operate impartially wherever conditions are such as to bring them into effect. For example, the rule of geographical uniformity would not prevent Congress from placing an exise tax upon banana growers, notwithstanding the fact that bananas are grown in only a few States. So in the present case our objection is not based primarily upon the fact that the act is in terms directed at and applicable only to certain States. It rests upon a more fundamental consideration arising from the nature of the tax sought to be imposed rather than from its geographical distribution.

Suppose, for example, that Congress enacted that in every State the income of husband and wife should be taxable to the husband. Such a law as we have seen would, in view of the Hoeper and other cases, be invalid for certain reasons pointed out above. It would not however violate the clause requiring excises to be uniform throughout the United States.

The act now under consideration not only contains all the objectionable features of the statute mentioned in the case supposed, but the additional feature that it levies an excise not operating uniformly throughout the United States, because of its levying upon spouses in community-property States burdens not imposed upon comparable relationships in other States.

The community relationship being as we have seen one in which the interests of the spouses are equal, it follows that a system of taxation if it would operate uniformly must take into account this essential though not formal severability of their interests, and must tax these respective interests exactly as it taxes the interests of spouses in other States upon income arising out of separate property or upon income originating in such a manner that it is the separate property of one or the other. In other words, there can be no discrimination between separate and community property.

For these reasons, we say that the proposed act does not operate with territorial uniformity and that it violates the constitutional provision in question. At the risk of repetition we again call attention to its specific results:

(1) Husbands in community States will be required to pay income taxes based in whole or in part upon the income of their wives.

(2) Husbands in community States will be required to pay income taxes at progressive rates, based not on their own income but on the combined income of the spouses. This results in discrimination not merely against the husband but against the marital community, since it forces their combined income into higher brackets.

(3) Spouses in community States will be prohibited from filing separate returns showing in their respective returns only the income properly allocable and belonging to them respectively under local law, while that right will be allowed without restriction to spouses in other States in respect of income essentially indistinguishable in origin or nature.

IV.—Practical Considerations

Recurring efforts to tax community income to the husband in community-property States are doubtless traceable to a feeling prevalent in some quarters that residents in community-property States have been given an advantage of a technical character in respect of income taxes. Legally we have seen that husband and wife in those States stand in a relationship respecting property and income in other States and that therefore the supposed discrimination in favor of the community States does not exist. To determine whether any actual advantage accrues to residents in community States would require an examination not only of laws relating to division and taxation of income but all other features of the community-property system.

Manifestly such an examination is impractical. The following observations may however be made:

(*a*) Spouses in community-property States are in some instances subjected to higher taxation through the requirement that community income be divided. This may arise for example where the wife has large income from separate property and the husband little or no income from like sources.

(*b*) Although under Treasury rulings and court decisions, spouses in community-property States have been permitted for many years[5] to divide community income for tax purposes, not one single State has joined the community-property ranks. The community system, insofar as it exists in this country, is largely the product of causes historical and somewhat accidental. Five of the community States originally belonged in whole or in part to the Spanish empire in America. Another, Nevada, is contiguous in geographical location to that empire as it once existed, and has undoubtedly been influenced by laws and customs proceeding from that course. Only two States, Washington and Idaho, have voluntarily, so to speak, and independent of preexisting customs or traditions, adopted the community-property system; and in both of these States the system existed long prior to the time when there was or could be an income tax levied by the Government of the United States.

The advantages therefore, if there are any accruing to taxpayers in community-property States, are purely an incident to a property system which in other respects may be and perhaps is disadvantageous. If the community-property system is looked at solely from the standpoint of the husband—at whom the act now proposed is particularly directed—undoubtedly it places him at a disadvantage in competition with persons similarly situated in other States. His power of disposition is limited; he actually acquires and owns but one half of the family income, owns but one half the family property. Instead of dower and similar rights, his wife takes in fee one half the estate at his death. He can dispose of but half by will and half only descends to his heirs.

Without in any way criticizing the community-property laws, it is proper to observe that the male citizenship of community States have relinquished in favor of their womenkind certain material advantages. Any contention that the community system is superior to the modified common-law systems prevailing elsewhere would have to account for the acceptance of the former by a minority only. That the fact which to most people would seem the greatest drawback of the community system, namely, the husband's limited ownership and control, may here operate accidently and in a minor way to benefit those living under it, should be regarded as a partial offset against possible disadvantages inherent in the community-property system and not as creating a class of taxpayers in any way preferred.

[5] Since 1921. See Opinion Atty. Gen., Mar. 3, 1921, 4 C. B. 238.

There is no reason based upon considerations of fairness or equity which require that the rights and liabilities inherent under the community-property system and established long before income taxes were in contemplation, should be interfered with, even if it were in the power of Congress to do so. In fact, as we have endeavored to point out, it is an equitable present system of taxation which the pending bill proposes to overturn, substituting for it one inequitable and discriminatory.

Summarizing, we may restate our objections to the proposed statute briefly as follows:

(*a*) Spouses in community-property States have present, vested, and equal rights in community property and income.

(*b*) One person may not be taxed upon income belonging to another; nor may one person's income constitute in whole or in part the standard or basis by which the amount of tax on another's may be measured. The proposed act violates these principles.

(*c*) A classification based upon the community-property relationship, not made applicable to persons who in respect of property or income stand in similar relationships, is arbitrary and unreasonable in that—

1. It discriminates against spouses in community-property States by denying them the right to form partnerships and obtain the benefits, for tax purposes, of a division of income.

2. It discriminates against such spouses by singling them out for higher taxation based on combined income while not taxing in a similar manner other relationships similar in their essential characteristics.

(*d*) The proposed act violates the constitutional requirement that excises must be uniform throughout the United States.

Respectfully submitted.

WALTER L. NOSSAMAN.

LosAngeles, Calif, April 12, 1934.

Mr. SHALLENBERGER. Our next witness is Senator Connally of Texas.

STATEMENT OF HON. TOM CONNALLY, A UNITED STATES SENATOR FROM THE STATE OF TEXAS

Senator CONNALLY. Mr. Chairman and gentlemen of the committee:

I want to express my appreciation to the committee for its indulgence in hearing me this morning and I will be as brief as possible.

I had the privilege of appearing before the full committee in December, I believe it was, on the general tax bill, and at that time there was some urge that there be included a provision on the subject now before the committee.

Mr. Chairman, I am not going to make an exhaustive legal argument. Mr. Fulbright, of my State, a very eminent lawyer, is going to make a legal argument, and Mr. Palmer Hutcheson, of my State, has already made a very able discussion before the committee.

I do want to point out some questions relating to policy, regardless of whether you have the power to do what this bill proposes or not. I want to touch upon matters of legislative policy and fairness in the construction of tax legislation.

Under this bill I want to call the attention of the committee to some language of the bill, without reading all of it. It provides—

> That for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse who has the management and control thereof under the law of the jurisdiction in which the marital community exists, * * *

In other words, this act, on its face, admits that while the property under the laws of the State actually and in good faith belongs, in community-property States, one half to the husband and one half to the wife, Congress will not accept that as a basis of determining income, but artificially and arbitrarily determines that while what I have stated is true, simply for the purpose of determining income-tax liability it shall be considered as the property of the one who controls it.

In other words, this act starts out upon the hypothesis that it will disregard actual ownership, but, for purposes of income-tax liability, will respect control, which is a rule of action which obtains in none of the noncommunity-property States.

In other words, it is proposed to lay down a harsh, arbitrary rule for a certain group of States, and disregard that same rule as to the other States in the Union.

Let me call the attention of the committee, furthermore, to the fact that you are not dealing here now with something that has been devised as a pretext for the avoidance of the payment of income taxes. You are not dealing with some studied evasion by a taxpayer to put his property into a certain theoretical ownership in order to avoid paying income tax.

Mr. COCHRAN. Will the gentleman yield there?

Senator CONNALLY. Yes.

Mr. COCHRAN. I would like to ask the Senator just how these eight States happened to adopt the community-property law.

Senator CONNALLY. I shall be very glad to explain that, insofar as I am able to do so. Most of the States—at least, my State, and I am not qualified to speak for the other States—inherited the system from the Spanish and from the Mexican systems, the Latin system, the civil law of Rome. We inherited the theory of common property as between husband and wife.

As you know, before Texas became a member of the Union it was a part of Mexico, and prior to that time it was a part of Spain. When Texas asserted its independence, as far back as 1836, it adopted a provisional constitution in which it was provided that the Government that should come into existence as a result of that revolution would respect the property laws that had theretofore existed.

Then, in 1840, I believe it was, Texas adopted a constitution providing that those community-property laws should continue to exist in the State.

Let me call the attention of the committee, furthermore, to the fact that in 1845, when Texas entered the Union, it was required that the constitution of the State should be submitted to the Congress for approval. The constitution at that time provided for the community-property system of husband and wife's property, each one having an equal share in it. So, when Texas came into the Union, Congress approved that constitution, and that created more or less a compact or a contract between the Federal Government and the State government.

Mr. SHALLENBERGER. So that in your State, Senator, there is a constitutional provision covering this principle?

Senator CONNALLY. That is correct. Mr. Fulbright will develop that a little further. I have the decision of the court here.

Mr. SHALLENBERGER. The only reason I ask you that, Senator, is that you will recall Congressman Evans said that in his State they did not have such a constitutional provision. But in your State you have it.

Senator CONNALLY. In case of *Arnold* v. *Leonard* (114 Sup.Ct.Tex.) it is recited that the Texas constitution defines the wife's property as that "owned or claimed by her before marriage and that acquired afterward by gift, devise, or descent."

It provides with respect to the rest of her property that it shall be held "in common with her husband."

So it is a well-recognized and a fundamental policy of my State from the beginning——

Mr. HILL (interposing). If I may interrupt the Senator, it has grown up as a rule of property in the jurisdiction of that court from the time away back when the territory of that State was under the jurisdiction of Spain.

Senator CONNALLY. That is exactly it. It is just as much a rule of property in our State as any other rule of property.

The point that I am trying to make is that it is not a fiction, it is not a pretext which we have devised in order to avoid the payment of income tax.

This was our policy and this was our doctrine long before there was any such thing as an income tax in the United States.

Mr. COCHRAN. Are you prepared to state whether any of the eight community-property States have their laws in respect thereto as the result of a legislative enactment?

Mr. CONNALLY. I am not prepared to state that. I am sure that these attorneys who are scheduled to follow me will discuss that in detail. I will not have the time to go into that in my own presentation.

Mr. EVANS. I am going to determine that for the committee, so far as California is concerned, right away.

Senator CONNALLY. I am really not trying to make a legal argument, gentlemen, because the attorneys have briefed this much more accurately than I have had the time to do. I am trying to present some legislative policies and to state what Congress ought not to try to do.

We start out with that fundamental principle, that where a group of States that have had from the beginning that rule of property, that rule of property is just as sacred as the rules of property in all the other States that do not have community-property laws.

In respect to these States, you determine the matter of ownership insofar as paying the Federal Government when it taxes income from property is concerned.

Now, the Federal Government respects the laws of Pennsylvania on the question whether a house and lot belongs to Bill Jones or Sam Smith, whether it belongs to a corporation or belongs to a partnership, or to any other legal entity of that kind.

It respects the vesting of the title of that property by inheritance, by gift, or by any other sort of decent. That is fundamental.

Mr. HILL. May I call your attention at this point to the fact that the State of Pennsylvania came in under the common-law rule of property.

Senator CONNALLY. Yes.

Mr. HILL. Under which all of the property that the wife brought to the marital community became the absolute property of the husband, both real and personal.

Senator CONNALLY. That is right.

Mr. HILL. Subsequently, the State of Pennsylvania changed, modified that law, and has done so from time to time until now the wife's right in the property has been recognized on a more liberal basis so that, under the laws of Pennsylvania, she can file a separate return, as can her husband, on their incomes.

Senator CONNALLY. To be sure.

Now, for the Congress to adopt any other rule would be to announce as a policy of the Federal Government, through its taxing power, that it seeks to coerce the States into changing their own domestic laws.

Mr. Chairman, it is fundamental, as I have just suggested, that the Federal Government has always, and should always in the future, respect State laws on property, unless, as I say, it is merely a pretext of some kind to try to avoid the payment of Federal taxes.

Further answering Mr. Cochran, let me suggest to him that in his own State and in other noncommunity-property States, wives do file separate income-tax returns.

Under their laws, the State recognizes the property that the wife possesses. It recognizes it. Why? Because that property is theirs, not because they control it, not because their husbands control it. But the determining factor is, under the laws of Pennsylvania, that such property belongs to the wife. If it belongs to the wife, then she may file a separate return on the income from that property. That is all that we are contending for here.

Mr. COCHRAN. Will the gentleman yield?

Senator CONNALLY. I shall be glad to yield.

Mr. COCHRAN. Of course, your argument proceeds upon the theory that the tax is based upon ownership.

Senator CONNALLY. That is right.

Mr. COCHRAN. In this bill they seek to get away from an inequality among the States by basing the tax upon management and control.

Senator CONNALLY. I challenge the point the gentleman makes as to inequality. In other words, if the property belongs to a woman in Pennsylvania, it is her property. Where is there any inequality there?

If it belongs to a woman in Texas and it is her property, she may make a return, just as does the woman in Pennsylvania. Where is there any inequality there? It is not a question of the wisdom of the State passing the law. We think that our State is far in advance of the common-law States which still have such portions of the old common law that treat the woman almost as a chattel; which says that upon marriage to a husband her property becomes his property.

We are making social progress in this country and this sort of an act would discourage the liberalizing of the property laws with respect to married women.

I want to call the attention of the committee to another fact. In some States—Virginia, as I understand it, notably—a woman may become a partner of her husband in a business, and if she does, half of

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the property is hers, and the Federal Government has recognized that, so that they may divide the income because they are partners.

Under our laws in Texas the wife may not become a member of a partnership with her husband. The law regards the marriage relationship as such that the husband and the wife cannot contract with each other; but the law comes along and makes a contract for them and says that this, in fact, is a sort of a partnership, that the wife's and the husband's earnings go into a common fund.

Is there anything more just and more fair under God's heaven than a community-property statute. I think that it is one of the most enlightened and progressive measures with respect to property rights that has ever come within my knowledge.

Mr. COCHRAN. You hold, then, that the forty other States should adopt the practices of the eight community-property States?

Senator CONNALLY. No. If they do not want to, they should not. That is their business. I think they ought to, but it is not for the Federal Government to say what they shall do.

Mr. HILL. They are getting the benefit of the right to file separate returns without adopting the community-property statute, are they not?

Senator CONNALLY. Certainly. Let me suggest to Congressman Cochran that, in Pennsylvania, if a husband decides to do so, he may transfer half of his property or all of his property to his wife. It becomes hers. She may file a separate return on that.

Mr. COCHRAN. Right at that point, they have to pay a prohibitive gift tax, and the Federal Government gets its revenue from that.

Senator CONNALLY. Oh, no. It may now prospectively, but it has not been the case in all these years.

Mr. HILL. Let me suggest to the Senator that up to $50,000 they do not pay any gift tax and after that $5,000 a year may be transferred without the payment of any Federal gift tax.

Senator CONNALLY. Certainly. It is a very small tax, until it gets into the very high brackets. In fact, it is only prospective. And that has not been the case heretofore.

Mr. HILL. And the fact is that the transfers have already been made, in most instances.

Senator CONNALLY. Let me suggest that since the income-tax law of 1913, in those States where there are great fortunes and great incomes, they have already done that. In a large measure they have already conveyed to their wives and to their children, in many cases, large amounts of money by gift, and they do now report them separately in their tax returns.

In our State, as I said a moment ago, we do not recognize any voluntary partnerships between wife and husband. They do in other States.

In our State, the law makes that a community or partnership agreement. And what is more fair or more just?

The old common law was a cruel, a harsh law, that the wife, upon marriage, should surrender over to her husband all of her property, all of her chattels, and the income from her real estate. We have gotten away from that.

Nearly all of the States have modified those old common-law rules.

One other matter, Mr. Chairman, and I shall be finished. I want the committee to bear in mind that in my State the title of the wife

is absolute. It is hers. There are no strings attached to it. There is no expectancy. There are no reservations or draw-backs. It is the wife's absolutely. Whatever control the husband exercises is purely that of an agency.

If you have a going business, of course, somebody is running that, and it is purely an agency. What right would the Federal Government have to say that a son's income, for instance, should be regarded as the income of the father, even though the father might control it?

What right would the Federal Government have to say that he must turn in his son's income as a part of his income and pay a tax on it?

I want to give you a very brief history of the congressional enactments on this subject.

In 1921 the Treasury Department or someone else was instrumental in inserting in a tax bill a provision seeking to tax community property as one income.

Mr. SHALLENBERGER. Along the lines of the provisions of this bill?

Senator CONNALLY. Somewhat.

It went to the United States Senate and there, after a thorough examination, the Senate rejected it and it went out of the bill.

In 1924 the famous Mellon tax bill was proposed and in that bill there was a provision of this kind, but the Ways and Means Committee of the House, after exhaustive hearings, and after argument, and after a thorough investigation of the subject, rejected it and struck it from the measure.

Mr. COCHRAN. Will the Senator yield?

Senator CONNALLY. I would be glad to yield.

Mr. COCHRAN. You bring in the name of Mr. Mellon.

Senator CONNALLY. I was merely bringing that in as descriptive of the bill, to identify it.

Mr. COCHRAN. I do not object to it at all. It suggests another question, whether you are speaking for the wealthy taxpayers of your State or the great class of smaller taxpayers.

Senator CONNALLY. I am speaking for all of them.

Mr. COCHRAN. I understand that the community taxing system of your State applies only to those taxpayers with an income of $6,000 or more per year.

Senator CONNALLY. No.

Mr. COCHRAN. Is that correct?

Senator CONNALLY. Oh, no.

Mr. COCHRAN. So far as Federal taxation is concerned?

Senator CONNALLY. Here is what the gentleman has in mind, no doubt. Until you get into the surtax brackets, of course, it does not make any difference whether the tax is filed individually or as a community return, because you pay the same rate on the income.

It is the normal rate. There is only one deduction allowed, and that is $2,500 for being the head of a family.

But our State law makes no differentiation even for the humblest woman in Texas. If she has a little old homestead that cost only $500, half of it is hers.

It does not make any difference whether the property is a millionaire's palace or a laborer's hovel; it belongs half to the wife and half to the husband.

Mr. COCHRAN. But do you not appreciate that surtax rates apply at present to surtax incomes of more than $6,000?

Senator CONNALLY. We have no legislation in Texas relating to Federal income taxation. We do not have a State income-tax law, so there is no legislation on the subject.

Under the Federal income-tax law, you do not pay the surtax until your income reaches a certain point.

Mr. COCHRAN. $6,000.

Senator CONNALLY. I think it is $6,000. It depends on the exemption. But there is nothing in our law covering that.

As I tried to point out a moment ago, this is not a pretext adopted for the purpose of avoiding the payment of any kind of taxes. It was adopted in 1836, and in 1840, and in 1845, by my State, before it ever came into the Union and before we had any conception of the Federal Government undertaking to vary our laws by this sort of legislation.

Mr. COCHRAN. Conceding that argument, if it should result in an inequality of taxation among the States, do you not think that equality should be secured?

Senator CONNALLY. You mention inequality of taxation. Would it be inequality of taxation for the Federal Government to say to Mr. Hill, "Out in your State your property belongs to you—all right. But Jim Jones over here has some property and some income from it and, in order to make you pay a little greater tax, we will tax your income as a part of his income."

Would that be all right? Why, certainly not.

I rather take the view that most of these States, or in the States where the incomes are not large—and the large incomes are here in the East, the Northeast—most of them have already taken advantage of the opportunity to divide their fortunes through the creation of trusts and through gifts to their wives and their sons.

There is no intimation that anything of that kind can occur under this law, because our constitution and laws prohibit the wife from altering that relationship—prohibit the husband from altering it. Their common property is common property, and the wife cannot contract with her husband respecting it at all. It is hers.

I do not want to take up any more time, Mr. Chairman. Let me suggest this: If you want to influence the eight community-property States to change their laws, and that seems to be the suggestion of the Congressmen, every other State has widely varying laws with respect to property rights.

Mr. COCHRAN. I do not infer anything of that kind. If such a bill is not passed, it may cause the other 40 noncommunity-property States to adopt the community-property laws.

Senator CONNALLY. If we want to change their whole system of property rights to get a little benefit from Federal taxation, that is a matter of policy. Take the other 40 States. They have dozens of different laws with respect to property rights. You will say that in this State over here, its property rights do not vest in the husband under its own laws, while technically we do fit in this Procrustean system which it is attempted to set up here. The only safe rule is for the Federal Government to go right on and respect the property laws and the property rights and the property ownership of each

individual State, so long as those laws are made in good faith and so long as they reflect the sound public policy of that State.

Mr. HILL. Let me interject, if you will. There is not a single noncommunity-property State in this Union under whose laws the taxpayers cannot now, by voluntary arrangement, devise schemes so as to enable the husband and wife to file separate returns.

Senator CONNALLY. Yes; all of the 40 States have done that; they are doing it, and they will continue to do it so long as they can.

Mr. Chairman, it seems to me that the community-property law is a sound and a wise provision. It was adopted in good faith, and it was not devised for the purpose of avoiding taxation. It is an announcement of enlightened and progressive public policy; it refuses to regard a woman as a mere chattel or a mere domestic servant but recognizes that in the marital union there ought to be as to property what religiously and sentimentally and theoretically is the situation which we are always talking about, and that the fruits of that union ought to be community property. The children are community property in every State. It seems to me that property ought not to be more sacred than human beings. It is sound public policy that the fruits of property—that is, the accumulations of the husband and wife—ought to apply to the husband and wife. That is my view. Other States are as free to adopt any rule which they may desire. We are not asking the Federal Government to interfere with the property rights in the other States. We do contend that when we came into the Union with this in our constitution and the Federal Government admitted it and has recognized it for 85 years, that we ought not now to be pushed and coerced and discriminated against on some imaginary theory that we are not paying our taxes, when every other State has the same right to have their income divided for tax purposes and to divide their property.

Mr. SHALLENBERGER. We thank you very much, Mr. Senator, for your very interesting explanation. I appreciate it, because you stated you were going to speak in general language. I am only a cornfield lawyer. I can follow you; some of the technical gentlemen got a little beyond me.

Senator CONNALLY. Mr. Chairman, I have a very high respect for the chairman's ability, lucidity of expression, and mental alertness.

Mr. SHALLENBERGER. I have asked certain questions of others along this line; certain of the gentlemen in discussing this bill have insisted that it would not apply to the 40 noncommunity-property States but only to the community-property States. Mr. Cochran made the statement that this bill sought to establish a new idea of determining the proper place to levy the tax by basing it on management and control rather than absolute ownership. We will say that if that rule were established it would seek to avoid the making of separate returns which is now proper in the community-property States, but would the same situation apply in Pennsylvania, in case we had that rule established? Even in Pennsylvania, where we take it Mr. Cochran may have property of his own and that his wife may have property of her own, yet, if his wife had that property absolutely vested in her, he would not be compelled to include that in his return. Why should not he be compelled to include that in his return?

Senator CONNALLY. He ought to and would be; as I tried to point out, this bill seeks to disregard the old rule of ownership as a standard of determining income and substitute for it control. In other words, no matter to whom it belongs, if somebody else controls it, for that purpose that person who controls it shall turn it all in and pay the income tax upon it. Suppose the Congressman should own certain lands and his wife had a certain definite interest in those lands. If he managed them and controlled them, under this law, he would have to pay all the income tax himself. Suppose they had a factory or an industrial enterprise; if he managed it and controlled it he would have to pay all the income tax.

Mr. COCHRAN. I am going to say that the Senator is not a cornfield lawyer, but he is a great constitutional lawyer.

Mr. SHALLENBERGER. I said that I was a cornfield lawyer.

Mr. COCHRAN. I would like to say this for the record: The common law of England is the law of Pennsylvania except as to those subjects upon which the legislature has spoken, and property rights in Pennsylvania are wholly statutory. There is no dower or curtsy, as there was under the common law. I want the record to show that.

Mr. HILL. The common-law rule no longer obtains in Pennsylvania, that when the marriage is consummated and the wife brings into the marital community certain property, that property becomes absolutely the property of her husband?

Mr. COCHRAN. No; that remains her separate estate and is under her management and control.

Mr. HILL. Under the law of Pennsylvania, a husband may give to his wife part of his property and it becomes her separate and individual property?

Mr. COCHRAN. Yes; it becomes her separate and individual property.

STATEMENT OF R. C. FULBRIGHT, HOUSTON, TEX.

Mr. SHALLENBERGER. Will you give the reporter your full name and whom you represent.

Mr. FULBRIGHT. My name is R. C. Fulbright; I reside at Houston, Tex., and not at Washington, D.C., as the committee calendar indicates; and I am proud to say that I am a native of that State as are the two speakers who just preceded me—one on Saturday and the other this morning.

I appear here for a group of Texas citizens who constitute what is known as a "tax committee." It is a rather indefinite organization which was referred to by Mr. Hutcheson on Saturday.

I shall undertake to avoid, as far as possible, a repetition of what has been said previously on this subject. In my presentation to the committee I wish to give some of the aspects of the practical operation of the community-property system as distinguished from the property systems obtaining generally in the other 40 States. Also, if I may not be considered too presumptuous, I wish to suggest the approach to this question which I would assume were I sitting in the important position which you gentlemen occupy. My opportunity to observe the workings of the community property laws has come about, largely, through the general practice of the law in the State of Texas for a little more than 25 years, after having a law school training in a common law State, where I thought I learned something of the common law with respect to property and income, as well as the general lines of modifications which have come about through statutory enactments, and through the years I have continued my interest in the modifications.

Not only do I respect and admire the members of this committee, but I have the most profound respect for the very responsible positions which you occupy. The Ways and Means Committee has the primary duty of determining the fiscal policy in solving the fiscal problems of the greatest nation on earth, and I wish to say that in my years of observation of this committee's work and the work of its predecessors, I am proud of the fact that they have exercised their functions independently. Of course, you have ever been ready to receive suggestions and to hear from both the executive branches of the Government as well as private citizens, but the determination of the policy has been the independent exercise of your own judgment, as, indeed, it should be. Not only this, but the members of this committee have certainly shown that they appreciate this responsibility by the tireless energy and the great patience which you have manifested in your investigation of this subject.

If I may be permitted to digress a moment in that connection, I recently sat in a trade-practice conference of one of the basic industries of the country. After some days of wrangling and of trying to work out some rules that would be equitable to distributors, manufacturers, and consumers, one of those present got up and said, "Gentlemen, I think by now some of us ought to begin to realize what Congressmen are confronted with when they try to make laws. I hope, after this, that none of us will go back home and critize them because we do not think they do things fast enough." It is that careful examination of all phases of these problems which should characterize your work, and if it works delay, let it work delay, rather than to be rushed into taking action which might not be so well considered.

The citizens of these States are not tax dodgers; I think that has been pretty well pointed out. As a matter of fact, the territory embraced in these States came into the United States in part by purchase and in part by what amounted to a treaty. Texas being in part an independent sovereign republic, the other part having been acquired through purchase. Now, at the time and before that purchase, there was already in effect in that territory this community property system.

In California, through the years, they began to make some modifications through the courts, and no less authority than Mr. Justice Stone, when he was Attorney General, in one of his opinions, stated that apparently the lawyers in California from the common law jurisdictions had become confused in the concepts of community property through their inability to understand the terminology of the community-property system as distinguished from the common law property system. In Texas, as was pointed out by the junior Senator from Texas, it was likewise a part of the law of Texas as a colony of Spain, later a colony under the flag of the Republic of Mexico, later under its own flag as a Republic, later under the flag of the Union, and then when we had it for a few short years under another flag.

We have been under six flags, and this system has been a part of our basic law, of our social system, in all of that period.

Instead of viewing the matter as having some relation to Federal taxes, it may be of a little passing interest to note that in the year 1917, when the Congress was engaged in passing tax laws with still higher surtax brackets, the Legislature of Texas passed a law by which it undertook to make the rents and revenues of the wife's separate property and the wife's personal earnings her separate property. If they had been trying to dodge taxes, they would not have done that. It was part of the campaign to give further recognition to the wife's separate earnings, but the Supreme Court struck that down as violative of the Constitution, continuing, however, in the wife certain rights to manage and control a part of that which constitutes community income. I shall refer to that more in detail later.

I may say, that due to that, that the proposal to single out these 8 States, frankly, and with all respect to this committee, offends the sense of justice of the citizens of those States, in that you would adopt a different standard for these States from that which would be provided for the other 40 States.

Now, before we proceed to the question of policy, it is necessary that we understand the nature of the thing that we seek to tax. As I have previously referred to the situation in California, there has been much misunderstanding of the nature of the community-property system. Mr. Justice Stone recognized that, and these test cases which went up to the Supreme Court grew out of that misconception. The dictum in the opinion written by Mr. Justice Holmes in the Robbins case, the California case, illustrated the same point, but later, when it came down to a question as to whether this was the real ownership or not, Mr. Justice Holmes did not voice a dissent.

A representative of the Department of Justice, in appearing before this committee, showed that he lacked an understanding of the nature and full import of this community-property system. I refer to the statement made by Mr. Monarch in which, at the outset, he said that he understands that the purpose of this bill is to eliminate what is thought to be a preferential treatment of our citizens, and I quote from his statement:

> Where the community-property system puts the spouses in a somewhat different relation as to property, as is the case of the other States, that system makes it possible for the husband in the community-property States to divide his income in two and report one half in his Federal-tax returns, the other being reported by his wife.

Again, later on in the same presentation, he says that as far as this bill is concerned, if it is enacted—

> instead of being permitted as is now the practice, to report one half of his income, the husband in community States will now report it all, but in addition he will report the income earned by his wife, and, in some cases, as we understand, he will also report the income from the wife's separate property—

showing that the Department of Justice still has the conception, which, by the way, is the thought of the man in the street in the common-law States, that these earnings are the earnings——

Mr. COCHRAN (interposing). Do you desire not to be interrupted?

Mr. FULBRIGHT. I have no objection to interruption; I appreciate your questions.

Mr. COCHRAN. I think what Mr. Monarch had in mind was what a number of the rest of us have in mind, where, we will take the case of a lawyer, for instance, in the State of Texas and we will assume that his wife has no income whatever and the lawyer makes $100,000 in 1 year and he reports in his income-tax return $50,000 and his wife reports the other $50,000, with damage to the exchequer of the United States Government. I would like to have your views upon the equity of that, considering the situation in like cases, in the other 40 States.

Mr. FULBRIGHT. I will illustrate that in two ways, by way of reply. I am a member of a law partnership. If I go out and try a case and am paid a fee for that service, that fee is not just my fee, because that service is a part of the partnership undertaking; that fee is one half my partner's, or whatever his proportion may be, and the rest my proportion. If I have no partner in my law practice, and I earn the amount you mention, which, of course, I do not, as it is earned, it is not mine except as to that one half proportion; it never is mine. I have in mind the question asked by the gentleman from Wisconsin along the same lines, who referred to his salary check and the salary check of the gentleman from Washington. Perhaps I could illustrate it better if I used the junior Senator from Texas, because I am more familiar with him, but, in both cases, when that salary check is issued, it is issued in his name, but it is but one half his property; put it a bank it is one half the wife's. In Wisconsin or Pennsylvania, if that is put in the bank, it is the property of the husband; it is his own property. He has the control of an owner, but he may give his wife the right to control that bank account and spend it, but it is his; there is the distinction. We are taxing in both cases that which from the beginning is the property of the person taxed. Therefore, we cannot feel that that is any kind of inequity; I am going to enlarge upon that as we go along by showing to this committee that it is not a fiction; it is a real thing, and that the wife may go out and spend that money and that the husband has no way to prevent its being spent, provided it is spent in maintaining the home and in the other things that they seek to do.

The gentleman from Wisconsin asked another question somewhat along the same line and that was, a man has a business and he has $100,000 income from that business. In Wisconsin that is his $100,000. In Texas that business is not his; it is only one half his, and if the wife is running a business, and we have wives who run businesses in Texas, and she separately manages and controls that business, every dollar the wife produces is one half her husbands, and it is strictly analogous to the first illustration I gave of the law partnership, which you can understand.

Community property and community income in Texas is subject to the payment of many liabilities and undertakings by the wife. For example, all prenuptial contract debts; all prenuptial and post nuptial torts; necessaries for herself and children; contractual debts created by her with her husband's joining; and her personal earnings and the income of her separate property for all her contract debts and obligations in tort. It has nothing to do with her ownership of income and that property. In other words, virtually and substantially all her debts are collectible from various items of the community income, as are his. There is no debt which the husband can create

which is exigible against all items of community property. There are debts which the wife can create which can be exacted out of items of community property.

A particularly interesting case involving a debt created by both husband and wife is *Cullum* v. *Lowe* (9 S.W. (2) 70), in which the wife's half of community property was subjected to the entire debt, although the husband had been discharged therefrom in bankruptcy proceedings.

In another case, *Shaw* v. *Shaw* (111 S.W. 223), the wife sued the husband—it was not a divorce suit—and asked to have the court appoint a receiver of both the separate property of the wife and the community property of husband and wife so that it might be handled fairly for their mutual benefit and the court enjoined the husband from interfering.

In another case, *Coss* v. *Coss* (207 S.W. 127), a wife sued for divorce and also for the protection of both her separate property and of her interest in the community estate and community income. The prayer for divorce was dismissed for want of jurisdiction, but the property suit proceeded, and therein the court granted a temporary injunction which on appeal was sustained, whereby the husband was restrained from disposing of the community property, from collecting the debts and from paying debts, and also the banks were restrained from paying any money or delivering any property to the husband.

In another case a question came up as to whether the husband was conveying community property with intent to defraud the wife and the Supreme Court of Texas held that she might maintain a suit to declare the trust and enforce it, which would have the effect to vest the title in the community. In other words, the wife has the right to the enjoyment of that property; she is entitled to provide for the household; to rent buildings in which they live and to purchase what she considers necessary for herself and her family. In that respect I may say that our Texas authorities have held that that must be in consonance with the situation in life occupied by the person concerned.

In Pennsylvania, a person may deposit his salary in the bank in his own name, and his wife may want to go out and spend that and he may notify the persons with whom he has dealt that he will not be responsible for his wife's obligations and they cannot touch his money. I have seen such notices in the papers in common-law States. I think I saw one in Washington where the husband gave notice to the public that he would not be responsible for his wife's debts. You cannot have that situation in Texas, because the wife can go on and make her contracts and they will have to be paid out of the community salary, which the husband has put in the bank, because that is for the support of this institution, the family. In other words, gentlemen, our arguments here are not the meticulous arguments of lawyers, but this bill is in substance a fundamental attack upon our basic law and one of our fundamental social institutions.

For example, as a further evidence of the wife's independent title to community property and its income, and the preservation of both during divorce proceedings the statutes of Texas affirmatively provide that—

> On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with the fraudulent view of injuring the rights of the wife.

I have observed this on a number of occasions, that where, in the domestic affairs of the family, it appears to the wife that her husband is wasting the substance of what they have, she goes to her lawyer and says, "What can I do about this?" I may give a case from my own experience, if you will pardon me. The lawyer says, "Well, I can sue him for divorce." The wife says, "Well, I would rather get it straightened out." The lawyer says, "You can bring a proceeding in equity", but that is rarely resorted to. The common mode of procedure is to go over and file a divorce petition and the first thing the lawyer does is tie up the bank account and enjoin the husband from disposing of the bank account and the husband comes up—but in the particular case I referred to it was not necessary to go that far, because the husband said, "There is trouble here, can't you get this straightened out?" It operates as a deterrent; it is satisfactory to our people; we have lived under it, and as the Senator said, we think it is the most enlightened system of considering the economic unity, the family.

Now, then, that is not all. The husband cannot devise away any part of that property, except his own share. If the wife dies, it passes by the laws of descent and distribution, or if she have a will, according to her will. He cannot encumber that.

Mr. COCHRAN. May I ask a question?

Mr. FULBRIGHT. Certainly.

Mr. COCHRAN. Can she take against his will? If he should determine to will his half of the community estate entirely away, has she a right in his half which she could assert against his will?

Mr. FULBRIGHT. Neither has any right against the other, with these two exceptions, because they rest on a different policy. If they have a homestead, the survivor has a right to occupy that homestead during life. There is also a provision for a year's rent for the widow, which cannot be taken away, but that rests on a different policy, but it has nothing to do with the ownership of the property. He may devise the property against her wishes, and she does against his, and it frequently happens; not only that, but to show how complete this partnership is.

Mr. HILL (interposing). What happens if neither makes a will? Suppose a wife dies without making a will, what happens to her property?

Mr. FULBRIGHT. I am coming to that. If they die, either with or without a will, the survivor has a right to qualify as community administrator or administratrix, and wind up the affairs of the community estate.

If you will pardon a personal illustration, we had this case in my firm, where a man had several grown children at the time of his death, and he left a widow who was a stepmother of these children, and they had accumulated some community property. Also, there was a lot of property which had been accumulated by him prior to his marriage to her, some of which was still definitely segregated. The children, by the way, felt that the mother was hostile to them, and that she would waste the estate or try to defraud them out of it. We were asked to file a proceeding to have an administrator appointed. The

wife came in and said, "I have a right under the law to be the administratrix of this estate", and we had to bow to that, on exactly the same theory as in connection with a partnership, because in partnership Texas has the common law of partnerships, except as modified by statute. Texas is partly a common-law State.

In 1840 a statute was passed adopting the common law except with respect to property. We made that exception and certain other exceptions which are not material here. In partnerships you have the common law applying except as to the ownership of property. The community system stops there. If a partner dies, the surviving partner has a right to close up the partnership affairs; it is analogous, and their responsibilities are identical in the case of the administration, except in the case of subsequent marriage of the wife before her services as community administratrix are completed; her powers terminate, subject to revesture, should she again become a widow and should the necessity for administration continue to exist. In the liquidation of the affairs of the community estate, all of the community debts stand against her interest as well as his. You have to settle up just like a partnership.

Therefore, you will see that the wife has an economic enjoyment. In that connection, I shall proceed a little further to the discussion here by counsel who appeared before you and told you upon that subject that the economic enjoyment of the income may be made the subject of the tax of the person that has the economic enjoyment. It is very obvious that the wife has that right, which is largely true in all these States. The difference between them is not very substantial, as the Supreme Court has pointed out. The wife has a present right of enjoyment; she has a right to manage and control parts of it; she has a right to contract, place obligations against it; she has a right to be supported by means of it; she has a right to have set apart to her her share of it, if any separation should occur; to devise it, and at all times she has a right to a legal or equitable action to prevent its unwarranted dissipation. The husband has no authority whatever to control its ultimate disposition after death, and if he disposes of it during the marriage, the proceeds are hers just the same as his, just as in any other partnership that becomes the case.

Therefore, it is seen that in Texas the dissolution of the community by the wife's death neither creates nor terminates her ownership of an equal half interest in the property. Her estate in the community is liable for her debts and for the expenses of the administration. She has a right to protect it against waste or impairment, a right to manage and dispose of parts of it, which may be changed from time to time and is changed from time to time by the statute. For example, we have a statute by which the wife may go through a proceeding in court and have the disabilities of coverture removed and thereafter trade and be traded with as a femmesole and conduct a business, but the husband has a half interest in that.

Mr. COCHRAN. Even though she may be a femme sole trader?

Mr. FULBRIGHT. Even though she may be a femme sole as a trader, and the community stands liable for these obligations incurred in the trade, because the theory is they are trading for the benefit of this joint-partnership undertaking.

You see how real this is; it is not fiction by any means, and that is the reason we feel it so seriously when an effort is made to attack it.

When this matter was before the committee in 1924, frequently, in the course of conversation with members of the committee, this would occur; I said my wife might run away tomorrow with the worst scalawag in the State and leave word with her lawyer to get one half of everything we had, and if I undertook in any way to prevent it I would be tied hand and foot before night. That is not true in your State; that is not true in Wisconsin, and it is not true in Nebraska.

A great deal has been said about this character of control. I am not going to repeat that, but I do want to illustrate it a little because it is of importance. In the authorities cited by the Government, where control is given any significance, it is a control that indicates a right to enjoyment in the person who formerly owned the property, and has undertaken to retain some rights of ownership in it; control connected with ownership. In the community State, the control is that of an agent, and nowhere has the law ever undertaken to tax the agent upon the income, as his income, which is in effect the income of his principal.

Mr. COCHRAN. May I interrupt? Does that theory of agency obtain in all of the eight community-property States?

Mr. FULBRIGHT. Absolutely, and no less authority than Mr. Justice Holmes announced in the case of *Arnett* v. *Reade*, that it was an agency control. It is announced by Chief Justice White in *Warburton* v. *White*; it has been reiterated many times. It is as though the Member who directed the question has certain properties in his home State; he is busy down here trying to make laws, and he finds someone at home whom he trusts and he executes to that individual an exclusive agency, a power of attorney giving him the right to dispose of property, sell it and reinvest, deal with it as an owner, the proceeds, of course, to be for the benefit of the owner who created the agency. Suppose, while that agent is going ahead handling the affairs of the Member and his own affairs, Congress should come here and propose a law which is going to say, "We are going to tax this agent in Pennsylvania not only upon his own income, but upon that income which is earned by virtue of his efforts for you; we are going to add that to the income of the agent and tax it all to him." You would say at once that is inequitable, because that income is not his, no matter how much control he has over it; no matter how wisely he has administered it or how much effort it took, it is not his; the person who had the beneficial enjoyment of that is the owner, who should be taxed, and in the community State the wife has the beneficial enjoyment of it in these and other respects which I have just denoted.

The same is true as to trusts. Reference has been made to taxing the trustee. There has never been any pretense of undertaking by legislation—not even a proposal—to tax a trustee on what the trustee individually earns plus what, as the trustee, he earns for the principal or the beneficiary. The tax is fixed upon the trust, if it is not distributable, because that earning is for the benefit of the one who is beneficiary. If it is distributable, the tax is fixed upon the persons who get the distribution. That is precisely the case that we have in the community States, which you do not have in the common-law States. There may be such a thing; a husband may be an agent of his wife to manage and control her separate property, and you would not think of such a thing as saying that he had to be taxed on what he made out of his management of that property, yet that is precisely

what this bill undertakes to do, not in all States, but it singles out eight who for generations have followed that concept of the basic law.

It is a very real thing, and when the Ways and Means Committee in 1924 sat over here in the other building, and this question was put up in this way, I well recall how a man who was later Secretary of the Treasury asked a number of questions exactly along the lines of those asked this morning. Mr. Ogden Mills directed some very searching and very pertinent questions, as these questions are pertinent, and at the conclusion of that presentation, those gentlemen—I do not know that there was any substantial dissent—decided it was not a wise policy. We did not stress constitutionality; we talked about the basic policy; we talked about unconstitutionality, but we did not have the test cases.

After that, when the Robbins decision came along in 1926, this dictum in there, where it said that it might be that the elements of control were so complete that it may be taxed to the husband. In fact, I believe, it states that "we believe Congress so intended." That made a challenge to the Treasury Department, and some of us who had been living with this question, as Mr. Dunbar, Mr. Hutcheson, and myself, were called in and the matter was discussed at the Department, and they said, "Gentlemen, we are going to go back and assess income in these other seven States to the husband as community income." We said, "That means an enormous amount of expenditure and effort, both on the part of the Government and the taxpayers. Why not let us have some test cases on this." After certain conferences with the officials it was decided to have some test cases to determine this question, and that was the inception of the test cases which went up to the Supreme Court. Also, at the same time, there was passed a statute, section 1212 of the act of 1926, which prevented them from going back in any event beyond a certain period, and that was a stop-gap.

The Treasury assented and the test cases were tried, and from that time on the Treasury Department and the administration considered it settled as between ourselves that it would abide by the result of those test cases, and in 1928 made no proposal and in 1932 made no proposal, nor did the preceding administration in any way consider, as far as I have been able to determine—and I have been living pretty close to this for a good many years—that the question was still one to be thrashed out. In fact, we felt a sense of security that Congress had decided that since this was our absolute ownership, and since this control was merely an agency control, that we would not be singled out and made the target of a different principle of taxation from that which obtained in the other States, namely, a taxation based upon control without ownership; not control with ownership or some kind of ownership, but a control without ownership.

Now, so far as this agency is concerned, I may say that another illustration is that if the husband becomes insane, automatically the wife becomes the manager of the community; he is out; he cannot manage it. If he abandons her and runs off and leaves the country, automatically she becomes the manager of the community. If he dies, she becomes the manager of the community. She does not have to go through and file a petition in the probate court to be appointed community administratrix. She can go ahead and manage it. If the creditors feel that there should be administration, they can demand one, if she was not properly managing the estate. She can be removed for malfeasance in fraud of the rights of the creditors. Nor has it ever been contended that her succession to the agency would operate to destroy or impair the husband's ownership in half of the community and the community income. The same way around, he could not impair her interest; her heirs would assert their right to that property.

Mr. Hill. Let me ask you right there. If the wife should die without a will, where does her half of the property go?

Mr. Fulbright. It goes according to the laws of descent and distribution. If there are children, it passes absolutely to the children, even though they be children of another marriage, or even if they be illegitimate children.

Mr. Shallenberger. That seems different from what was stated before. What if the children were the children of another parent?

Mr. Fulbright. It would be the same; they are her children; they may be by a prior marriage.

Mr. Shallenberger. I thought it was the other way around.

Mr. Fulbright. They would not pass to his children in any event. It is her children, and they have a right to one half of the accumulation, whether they are the children of the two spouses or her children.

Mr. Shallenberger. If her own estate, after death, amounts to more than $50,000, does the Federal Government collect an estate tax on her share?

Mr. Fulbright. From the beginning the Federal Government has taxed only the interest that passed. They levy the estate tax if she dies on her one half. In fact, they did that in California. The opinion by Mr. Justice Stone, when he was Attorney General, I think, was the one that said they could levy the tax on her half.

Mr. Evans. Even before they amended the statute?

Mr. Fulbright. Even before they amended the statute; yes.

Mr. Hill. The Government recognizes fully her ownership of that one half through the mere fact of collecting an estate tax upon it at her death.

Mr. Fulbright. Of course.

Mr. Hill. And it does not collect an estate tax from the husband's half, if he survives?

Mr. Fulbright. Let us say the husband died on the last day of the month, and his salary for that month had been earned. That salary would be community income. He would have a half interest in it. Only one half would be his estate, and the same way if she died, and he had earned the salary; it would not be his; one half would be hers and taxed in her estate.

But I want to go further and show that while they were living together the economic enjoyment and benefits which counsel have referred to rest in the wife, and she is empowered with legal rights of action by which she may protect those interests. Miss Carloss, in her excellent presentation in which she went, in a limited way, into this situation, stated that equitable remedies would apply in the State of Texas. I am going a little further and point out in detail, so the committee will understand this is not a fiction; so when they talk about it, as the counsel for the Government did, that they can divide the husband's income, it is not a fact. He cannot divide his income.

The husband, in the community-property State has to report every cent of his income, if he complies with the law.

Mr. COCHRAN. Assuming that only one half of what he earns is his.

Mr. FULBRIGHT. It is not an assumption. That is the difficulty; you are thinking in common-law terms, if you pardon me for being personal. It is assuming; it is not an assumption; it is the property law. It never is all his, because under that law, when he is working, or she is working, it is theirs, one half vested in each, with the right to the services and the right to the maintenance of the family.

Mr. COCHRAN. It is compensation for his personal services alone?

Mr. FULBRIGHT. The compensation is not his; you cannot assume about it; it is a fact; the law says it is one half his.

Mr. COCHRAN. I understand that, but it is that very working of the law that produces the inequality that we are seeking to correct.

Mr. FULBRIGHT. Yes; but not all inequalities are unjust. The thing is, if it is actually only one half his, and in the other States it is actually all his, you are not dealing unequally with them, if you tax every person on what is his. As I was pointing out in all these illustrations, not only is half not his but the wife may go in there and spend it; she may go in there and create obligations against it. The salary she may have may be a small salary. She may go down and buy groceries and contract to pay the rent, and when the bills come in he has to pay them. She can buy the children's clothes and send them to school, and all that, because the theory is the wife is cooperating in the family institution. She has the rearing of the children and she has the taking care of the home; she is providing for their education; she is seeing that they get the necessaries when the husband is tilling the soil. It is as important to society that that conception be carried out in practice as it is that the husband shall earn money, because, after all, the most important service in the social fabric is the service that the oldtime mother has performed in rearing the family as a social institution. That is the theory of our law; it is as sacred to us as that of mother. Those rights are jointly exercised; I do not say that all mothers are ideal or that all wives are thrifty, but that is the basis of it.

Mr. SHALLENBERGER. You do not mean to limit your claim to the oldtime mothers.

Mr. FULBRIGHT. No, sir; I think the modern mothers are doing a great deal to assist their husbands, and in a good many instances the husbands would not be very far if it were not for them, and I would not have to go very far to make some illustrations.

I want to talk a little more about the inequality. In these community-property States it has already been pointed out how these divisions of property and income can be legally brought about. In the other States, the property is transferred, and the wives file separate returns. Partnerships are formed in a great many States. An illustration was given of such a partnership in Virginia, where a case came before the Board of Tax Appeals and was later acquiesced in, where two husbands took their wives in as partners, the husbands continuing to run the business, and the wives, due to the fact that they had vested in their wives a one half interest in the partnership, it was sustained. That can be done in Pennsylvania; it can be done in Nebraska and it can be done in Wisconsin, and you see it is being done to a greater or less degree in the division of property.

When a man has accumulated a lot of property, if he has a proper sense of responsibility to his family, he will set property aside to care for them. The tax law has probably encouraged some of them to do more than they would otherwise have done. When you go to figure on inequality, we have to take that element into consideration. That has not been done in any of the estimates that have been made by the Treasury Department. They estimate how much more income would probably be derived if you tax the income of the husbands instead of having it taxed as it is owned, but to determine the inequality, you should make the survey to determine the extent to which already in the other States divisions have been, are being and may continue to be accomplished.

For example, if you look at the statistical reports of the Commissioner of Internal Revenue they will indicate that in the noncommunity property States there is a substantial amount of savings effected by such property divisions. For example, during the year 1927, the average net income returned by wives filing separate returns in the State of Texas was $3,565, while in the adjoining State of Oklahoma it was $8,475. If you take the total of the income in the community incomes of the wives and those embody only separate incomes, and compare them in Texas and Oklahoma, they will run pretty much the same. Conditions in Texas and Oklahoma are largely the same; they both primarily produce agricultural products, livestock and petroleum. Those are the basic industries of those States, yet there is little difference in the distribution of the tax burden in those States.

If we take Louisiana and Arkansas; those two States have largely the same industries; they raise more cane in Louisiana than in Arkansas, but they have Helena in Arkansas, if you will pardon the pun. The average net income returned by wives filing separate returns in Louisiana was $3,602 and in Arkansas, $8,235. If we turn to the Eastern States it will be found that the separate returns of wives run into very large figures and the averages run very high. In New York, the average for 1927 is more than $14,234, and in Delaware it was $22,696.

Mr. HILL. What are those figures?

Mr. FULBRIGHT. That is the average amount of income returned by all the wives making separate returns in those States. The average for all individuals was much lower than that, something around $500. In Pennsylvania, it was about $12,000

Mr. SHALLENBERGER. Have you the figures on the total number?

Mr. FULBRIGHT. A larger number of returns, of course, have been made by wives in community States. In all of the community States, except California, the amounts returned by the wives in separate returns is substantially less than in the eastern States, and also the amounts returned by them as community income in separate returns is substantially less. California is a very rich State and is more comparable with New York.

Mr. COCHRAN. You will agree that, maybe due to accident, there is more wealth in New York than in some of the community-property States.

Mr. FULBRIGHT. There is no way to state what it is due to. Certainly, some is due to the division of property. When you talk about a saving of any amount of money, you are not measuring inequality.

You are talking about people going into the surtax rates; the inequality has been largely taken up through what they have done and what they may continue to do. The gift tax has relatively little effect; they can still save more in income taxes than the amount of the gift tax.

Here is another thing; I will give some 1927 figures; in the eight community-property States, in 1927, the total amount of community income returned by wives—and that is dealing only with those where there was over $5,000, because that is the way the Government keeps statistics—amounted to $154,637,158. Now, that was only sixty-nine hundredths of 1 percent of the total net income returned by all individuals throughout the country, or approximately two thirds of 1 percent.

Mr. COCHRAN. That was $154,000,000?

Mr. FULBRIGHT. $154,000,000 of community income by the wives in all the eight community States.

Mr. SHALLENBERGER. Have you figures to show how much was reported by wives in noncommunity States?

Mr. FULBRIGHT. In New York alone, for that same year, the wives filing separate returns reported $384,269,000, or more than two and a half times, in New York alone.

Mr. SHALLENBERGER. In what year was that?

Mr. FULBRIGHT. In 1927. That was more than two and a half times the gross amount of community income return filed by the wives in the eight community States.

Mr. SHALLENBERGER. How did the population compare? Are there more people in the eight States?

Mr. FULBRIGHT. There are more people in the eight States than there are in New York. We will admit that incomes are higher in the East, too.

In Pennsylvania, the wives in their separate returns returned over $107,000,000, or more than two thirds as much as in all of the eight community States together. In Illinois, $101,000,000; Massachusetts, nearly $80,000,000. That is a very important thing. In these four States alone, for 1927, in the separate returns of wives, there was a total of $673,187,000 of income returned separately by them, and this was nearly four and a half times as much as the total community income returned by the wives in the eight community States.

In the little State of New Jersey, there was $58,728,831 so returned, while in Ohio there was more than 65 million and, by the way, in Ohio they averaged about $13,000 each and in Pennsylvania about $12,000 each. You see, when you get into the surtax brackets, do not forget these people know what they are doing, and the wives are making their returns and there is not that inequality which you thought was there, because, when you come to measure inequality, you have in some way to take care of that in the equation. Let me give other figures, taking 1927.

Mr. SHALLENBERGER. Why do you take 1927 and not more recent years?

Mr. FULBRIGHT. Because, I think Mr. Parker stated that he would not consider 1928 and 1929 as representative years. They were much above, in the amount of income, and in 1932 it was below. For the Southwest, 1931 is a good year to take. I am going to give some 1931 figures, because the depression, which started in the fall of 1929, had not affected the far West and the Southwest in 1931 as it had in other sections of the country. The community income in the eight States in 1931 was not much less than it was in 1927.

Mr. SHALLENBERGER. I have asked this once before, and you have stated that the State of California, and, I think, the State of Texas are comparable to some of the larger Eastern States, like Pennsylvania and New York. Have you figures to show how many wives make separate returns in New York and Pennsylvania, as compared with the community-property States of Texas and California?

Mr. FULBRIGHT. In New York, 27,067 wives made returns totaling $384,268,916. In the three States put together, Louisiana, Washington, and Texas, there were 2,026 returns by married women; that includes those who made separate returns, or, about two thirds of the number in New York alone.

Mr. SHALLENBERGER. Let me get that again. Your figures show that in the States of New York alone, there were more wives who reported their incomes separately than in the three States you mentioned?

Mr. FULBRIGHT. By more than 7,000. Of course, there are many more in New York than in the other States. I do not have Pennsylvania before me, but in Massachusetts, there were 7,857 who reported in separate returns $79,754,430, averaging $10,150 each. The average in Texas, including only those having over $5,000 was $8,990. In the State of Washington, it was $7,719 and in Louisiana it was $9,107. In Oklahoma the average was $8,475; Arkansas, $8,235; and in Tennessee, $9,044.

We are taking the States in the same territory, and it shows that there is not this enormous disparity or inequality that we have been talking about.

Mr. SHALLENBERGER. That is the amount of the net income reported in their returns?

Mr. FULBRIGHT. Yes, sir; only those who filed separate returns. In 1931 we have quite a similar picture, only the incomes are much lower. I mentioned the three States of Louisiana, Washington, and Texas, as contrasted with New York and some of the Eastern States. In those States there were 14,551 married women's returns made, including all of the separate incomes and those of community income, the latter being only those where more than $5,000 is involved, whereas in New York there were 18,841 and in Massachusetts 6,322.

Mr. SHALLENBERGER. Making separate returns by the wives?

Mr. FULBRIGHT. Separate returns by the wife; they make no community returns. The average income return for the three States, Louisiana, Washington, and Texas, was $6,664, and the average for Massachusetts was $6,473. We are getting pretty close there. The average for Oklahoma was $5,767; very little difference. The average for New York was $8,545.

Here is another thing; in 1931 the total amount of income returned by wives in community-property States, which included all this community income in separate returns, was $146,520,000, and those constitute 1.07 percent of individual income of the income returned per return. In the eight separate States the average of the separate returns was $7,124. The average per return of wives' separate returns for the 4 States I mentioned, New York, Pennsylvania, Massachusetts, and Illinois, was $8,540, and those 4 States returned $303,-

250,000 of income, or more than double the amount in all of the eight community States. I am talking about what the wives returned separately in those States.

In New York alone, in 1931, married women returned $160,993,000 of separate income, or more than $14,000,000 in excess of the entire amount of community income returned in all of the eight States.

I am giving that to show that there is something to what we have been talking about; that there is not this big inequality that you speak about.

You take where the property amounts to something, it has already been divided; the lawyers of those people have not been asleep, and they are not asleep. Do you mean in Massachusetts they would not take care of that situation? I do not know that it is so bad, after all. If I were in a common-law State, I would transfer to my wife for my family, set apart property to them so that they could be cared for, and I would do it whether we had an income statute or not. Their arrangements are for the benefit of them, and you are not going to do anything about it except by the little amendment to the effect that losses in a trade between husbands and wives will not be recognized, but these property rights have already been fixed. They cannot adjust losses themselves; that is all right. We cannot adjust losses as between ourselves in community States; we never could; they are joint losses; one half is sustained by each, absolutely.

There is another angle of that which I want to mention. A representative of the Treasury Department stated—I do not have the exact figure—that there was a certain percentage of income returned in the 8 States and only 7 percent of the taxes paid. That is no way to measure the difference. I picked out 8 States in the general territory of these 8 community States, Arkansas, Oklahoma, Kansas, Nebraska, Colorado, Utah, Oregon, and Montana. I took this year, 1927, and found that although they returned 4.4 percent of the total net income of all the country, they only paid 2.18 percent of the taxes. Can I reason from that that you in Nebraska are not paying your share of the taxes? No. There is a difference in the amount of the incomes, and yet, when they take the country as a whole and average it, throwing in New York and Pennsylvania, it is unfair to use that method or standard to measure the difference in the amount that might be saved.

Mr. SHALLENBERGER. We have reached the time when we ordinarily adjourn. If you can complete your statement in a short time, we will remain. Otherwise, we will adjourn until Wednesday.

Mr. FULBRIGHT. I had in mind briefly to discuss these conditions.

Mr. HILL. Would you prefer not to be under stress and make your statement at the next sitting of the committee?

Mr. FULBRIGHT. I would prefer to do that; I am sure I can get through in 30 minutes. Please let me tell you this, before you recess. I do not agree with the statements made by my fellow counsel that the position of the Government is that income can only be taxed to the person that absolutely owns that income. I think their contention is it can be taxed on control. They have cited certain authorities and I want to meet them on that ground. I think I can convince this committee that it cannot be done on the character of control that exists in the community States.

Mr. COCHRAN. That is important.

Mr. FULBRIGHT. It is important, and it has not been touched. I have recognized that difference jand you have recognized it, Mr. Cochran. That is the thing I would like to discuss.

Mr. SHALLENBERGER. I will have to state that I have had a conversation with Mr. Doughton and he wants a meeting of the full committee tomorrow. We will have to adjourn until Wednesday. We will adjourn until 10 o'clock Wednesday morning.

Mr. EVANS. The chairman asked me whether or not the California Constitution had any provision affecting the community interests. At that time I was unable to say definitely. I was under the impression that it had not. I have since examined the constitution thoroughly and I find that there is no provision relative to community-property interests. There is, however, this section of article XX of the California Constitution, which states:

> All property, real and personal, owned by either husband or wife before marriage and that acquired by either of them afterwards, by gift, devise, or descent shall be their separate property.

That is the only expression affecting the interests of husbands and wives in the Constitution of California.

Mr. SHALLENBERGER. We will adjourn until 10 o'clock Wednesday morning.

(Thereupon, at 12:30 p.m., the committee adjourned until Wednesday, May 9, 1934, at 10 a.m.)

COMMUNITY PROPERTY INCOME

WEDNESDAY, MAY 9, 1934

House of Representatives
Subcommittee of the Committee on Ways and Means,
Washington, D.C.

The subcommittee met at 10 a.m., Hon. Ashton C. Shallenberger (chairman) presiding.

Mr. Shallenberger. The committee will be in order.

Mr. Fulbright will resume his statement.

STATEMENT OF R. C. FULBRIGHT—Resumed

Mr. Fulbright. Mr. Chairman and gentlemen of the committee, when the session was concluded on day before yesterday I made a statement which was not quite what I intended to make. I stated that I did not agree with my fellow counsel, who stated that the contention of the Government here, or the admission of the Government, was that income tax must be based on ownership. I think that that statement has been made by some of the representatives here, and I thought I saw a shake of the head by the Government representative at the time.

What I wish to do, gentlemen of the committee, is to make clear what I conceive to be the contention of the attorneys who have made arguments in support of the proposition that your bill might be held to be constitutional. They do not say that the Congress must tax income based upon ownership as defined by the State law.

Mr. Shallenberger. Who do not say that?

Mr. Fulbright. I am trying to distinguish or to set forth what I conceive to be their statement.

Mr. Shallenberger. You are not referring to the Supreme Court?

Mr. Fulbright. I am talking about my fellow counsel here, Mr. Stam, for instance.

Mr. Hill. May I suggest that that is a little confusing to me. I do not know to whom you are referring, whether you are referring to the men on your side of the table or those who are sponsoring the bill.

Mr. Fulbright. I know that in their presentations Judge Donworth, Mr. Summers, and Mr. Dunbar all drew the distinction here that the control in the community-property State is merely an agency control and is not related to the ownership.

It is not an ownership control. I did not understand them to state what I have stated, but there have been statements here to the effect

that the Government concedes that you cannot tax control as such. I do not understand that to be conceded by the Government.

I understand that their position is that where that control carries with it the right to the economic enjoyment of the thing controlled, then Congress has the constitutional power to tax that character of control.

In other words, as expressed in the dictum which was read by counsel in the Robbins case, that said that the husband had unfettered control to do with it as he pleased; and that if that be the character of the control, that gives the husband the right unfettered to do with it as he pleased and that is equivalent to a species of ownership, you might say, which can be taxed by Congress.

And I am inclined to believe that there is something in that view.

What I wish to point out and did point out in the last session is that this is not an unfettered control. I wish at this time to refer to the decisions here which were cited by counsel of the joint committee, to show that they do not in any sense deal with the character of control which is embraced in this proposition.

One of the earliest cases they cite is that of *Corliss* v. *Bowers* (281 U.S. 176), which was the case of a revokable trust. There the party owned the property. He granted it to a trustee. He reserved the right to recall it, or change it, or enjoy it; he had not parted with his title and control.

In other words, he had a control, but his control was coupled with that ownership which he had not entirely released.

In other words, the beneficiary did not have a title that could be taken out and sold and passed on as the title of the beneficiary or the grantee. He still had it.

Now, that kind of control is a control which is a part of the ownership right still reserved and can be carried back. Congress has all along sought to prevent tax evasions of various kinds that come about because of a partial disposition of property producing the income, by which the party who has parted with it still has some right to prevent the adverse party from enjoying it.

The strongest case on the trust was the very recent case of *Reinecke* v. *Smith* (289 U.S. 172), decided April 10 last year by the Supreme Court.

In that case, the grantor creating the trust granted the property, conveyed the property to the trustee for the use and benefit of some members of his family, I believe—I have forgotten the exact facts—but reserved the right, acting in conjunction with the trustee, to revoke or alter the same. Apparently he thought he was getting around this other situation, because it was not wholly within his power to revoke it, but it was in the power of the agency which he had created, the trustee, and it was not in the power of the adverse party to prevent him from revoking it.

That was pointed out very clearly by the decision of the Court, by Mr. Justice Roberts, in whch he went back and referred to *Reinecke* v. *Northern Trust Co.* (278 U.S. 339), which construed section 402 of the Revenue Act of 1921, which included within the sweep of a transfer tax any interest of which a decedent had at any time made a transfer or created a trust intended to take possession or enjoyment at or after his death.

He points out that in that case the tax was upheld as applied to the corpus of the trust over which the grantor had sole power of revocation.

It was, however, condemned as to those where the revocation was dependent upon joint action of the grantor and the beneficiary, for the reason that the interest of the beneficiary was adverse and the grantor was unable at will to alter or destroy the trust.

Then he goes on to distinguish this case; he said in this case, the *Reinecke* case, the adverse party to whom the property is conveyed or for whose benefit it is, has it not within his power to prevent the estate from going right back to the grantor, and the mere fact that the trustee has to agree that it go back to the grantor does not help the situation, because still the grantee has not yet a title which the grantee is entitled to enjoy.

I may illustrate that in this manner, if you will pardon a personal illustration. Suppose I make one of you gentlemen a trustee for the benefit of another one of you gentlemen, and provide there that that might be revoked by my trustee and myself.

The person who has the benefit of that income or property, if he undertakes to sell it, and should go to one of you and try to sell it, would be told, "Why, you have no title. You have nothing. I would not be buying anything from you. Why, do you know, it might all be taken away from you without your consent and despite anything that you may do? They have only given you something with a string to it."

That is what Congress was trying to get at in those cases.

Now, when we come down to the question of control, there was the control still in the grantor who first owned the property, the control of an owner, with the right, without the consent and over the protest of the adverse party, to take the enjoyment away from him and revest it in himself.

You do not have anything like that in the community-property system. It is an agency control.

Mr. SHALLENBERGER. Mr. Fulbright, the case that you are discussing, did that arise in a community-property State?

Mr. FULBRIGHT. No. That was not involved. Of course, it would be the same principle if you did.

Mr. SHALLENBERGER. I thought you said that the situation you were discussing could not arise in a community-property State?

Mr. FULBRIGHT. No. What I meant to say was that in the case of community-property control—I did not make myself clear on that—this principle would be exactly the same no matter in what State it was applied. If I undertook to do something like that, for instance, I could no more convey my property and keep a string to it, as Mr. Summers said, in a community-property State, and get away from the tax, than I could in any other State.

Mr. COCHRAN. May I interrupt you to ask a question?

Mr. FULBRIGHT. Surely.

Mr. COCHRAN. Taking your hypothetical case, is it your contention that Congress could not pass a law taxing the income in the hands of the trustee, because the trustee has the management and control?

Mr. FULBRIGHT. That is correct. In other words—I illustrated it the other day by just taking the case of an exclusive agent. Congress could not pass a law taxing that agent personally.

Mr. COCHRAN. Oh, no.

Mr. FULBRIGHT. That is what it would amount to.

Mr. COCHRAN. That is not what I asked. Whether Congress could pass a law in the hypothetical case which you mention, taxing the income in the hands of the trustee because the trustee has the management and control; that is the question.

Mr. FULBRIGHT. As I understand the case you refer to, my answer is still they could not, because there you would be taxing the trustee when the economic enjoyment was somewhere else. That control is not the control coupled with the economic enjoyment of the thing. That is the character of control that I understand the Government refers to in a mere bare agency control. They do not contend for a moment that Congress could go out and tax an attorney out here or a trustee based upon his personal income plus the income of the property he manages for you. They do not contend that at all.

Mr. HILL. May I suggest, if the trustee should be required to pay such tax, it would be paid out of the trust fund and not out of his personal account.

Mr. COCHRAN. Oh, yes; that is what I meant, Mr. Hill.

Mr. FULBRIGHT. Yes; but this law says that it should be considered as the income of the spouse having control and that the tax shall be computed in that manner.

Mr. COCHRAN. Yes; but that is solely for tax purposes.

Mr. FULBRIGHT. For tax purposes.

Mr. COCHRAN. Yes.

Mr. FULBRIGHT. But the point is, it does put the tax on him, not on his wife. The tax is fixed on him, on his income, plus the income over which he has control; do you see the point? That is what the tax is fixed on.

In other words, it may be stated in this other way: It would add his individual income to his trustee income, and make him pay a higher rate of tax by reason of that addition. That is what is undertaken here in this bill. That is the purpose of the bill.

The point that we are making is that the character of control that you are seeking to tax there is merely the agency control and not the control that carries with it the right to the economic enjoyment of the thing controlled; and that is because, as I stated the other day, it is a parnership enterprise, in which the other party has a right of enjoyment and has the power to deprive the husband of that control under certain conditions.

The husband has it not in his power to continue that control under all conditions. Her death dissolves it. He has to wind it up.

Mr. COCHRAN. This bill, as I look at it, would not disturb the right of ownership in a community-property State, but it seeks solely to tax the income and after the tax of the income is paid out of the property, the ownership remains exactly as it was before.

Mr. FULBRIGHT. I agree with you. Congress could not change the ownership in the State. We are not arguing that, and I do not mean for a moment that anyone contends that they could. But what I do undertake to say is that Congress is undertaking to exempt the wife from tax on what is hers. I suppose that is what they would do, although they do not say so.

That one half of the community income is hers. It is vested in her.

Under other sections of the law she would have to pay a tax on it. I suppose the purpose of this is to exempt her from that, but to tax him upon that income, added to his own income, or his own income added to that.

The theory of this is—the theory of the Government, here, is—that that can be done because Congress can tax control. As I stated, they do not mean that you could tax bare control as an agent.

What they undertake to say is that where the control carries with it—let me say where it is an unfettered control and carries with it the absolute right of enjoyment or the right to call it back, as is the case in these trust cases, based on ownership, then certainly they could tax it—Congress could tax it.

The point that I am trying to make clear is that under the laws of these States it is not, and the Supreme Court has found that it is not, that character of control. Mr. Justice Holmes and Mr. Justice White, in opinions in which there was no dissent, have stated that it is an agency control and not an ownership control; and there is nothing in these trust cases to the contrary.

Mind you, they did not undertake to tax the trustee in these cases. They undertook to tax the man who beneficially owned the property, and had not completely parted from it. Control was involved there. The title had gone out of him; the legal title had gone out of him. To a certain extent there was an equitable title out of him, but he retained the right to bring it back.

The grantee could not prevent him from taking that back and enjoying it himself.

That, plainly, is a character of tax evasion, it seems to me, and certainly is not the character of the situation we would have in these community-property States at all, because, in the community-property States, in the first place, you never own but one half of your salary, for instance. You cannot talk about your salary being $8,500 a year, as was stated here in a report, because it never belonged to you. The wife has the right to enjoy it, has the right to go out and make contracts and be responsible for it. The minute you get that check, one half of it is hers and, while you perform that service, it is one half her service, as much as it would be with your own law partner with whom you had a 50–50 partnership agreement.

There is the distinction.

Now, there is another case referred to by the Government, Burnett against Wells, which was a case of an irrevocable trust in which the income was to be applied to the payment of an insurance premium, under the insurance contract, which the grantor had entered into.

Mr. FREAR. May I ask you a question there, Mr. Fulbright? Has that case been cited here before and argued here before this committee?

Mr. FULBRIGHT. The Government cited it, and I am merely referring to it to this extent. There is was not a question of the parting of the title under the irrevocable trust, because, under the irrevocable trust, a part of that income went to beneficiaries over and above that necessary to create a reserve for the premium.

The Government did not question but what the beneficiary was the one taxed on that, and not the grantor. But as to that part of it which the grantor had reserved the right to be applied on the carrying out of his insurance contracts, he was getting the enjoyment of it.

Now, if you will pardon a personal reference, I had occasion to draft a silimar trust agreement a few years ago and it was my opinion given to my client at that time that Congress did have the right and had provided that where he retained that right of income to apply on his policies, he would have to pay the income tax on it.

When it came to the estate tax, it would be a different matter.

Mr. COCHRAN. That is, on the portion——

Mr. FULBRIGHT. On the portion to be applied to carrying out the payment of the premiums.

Mr. COCHRAN. To pay the premiums on his insurance?

Mr. FULBRIGHT. Yes. Therefore, it is an entirely different situation. He had parted with control, so far as the trust was concerned, but he had not parted with control so far as the insurance policies were concerned.

He was carrying out his insurance contract and it was the control coupled with the ownership which he previously had in the property and the right to continue to have this income applied to his own economic enjoyment, as the Court stated it.

I want to refer to two other cases here, *Taft* v. *Bowers*, in 278 United States 470, which was referred to by counsel——

Mr. FREAR. That was referred to also by counsel for the community States, was it not?

Mr. FULBRIGHT. Yes. That was a tax on the donee. I wish to again to point out simply this fact in that connection, that the tax there was placed upon the owner of that stock, the one who realized the income, and it had not cost the owner anything.

There was a statute there which reduced the amount of that, and based that income upon that of the donor.

I do not see that it has anything to do with the question of whether or not Congress could tax control. It cites certain other cases there, which I will not have the time to go into, and they would not have any bearing upon the issue here.

In *Burnett* v. *Harmel*, which was referred to, that was a case where Congress passed a statute providing that as to a certain character of capital gains, the taxpayer would have the right to place a limit of 12½ percent on the tax on his property. All that the Court was trying to do was to find out what Congress intended to include in that. There was nothing there that indicated that they would or could override the law of the State of Texas with respect to it.

I believe the dissenting opinion in *Hoeper* v. *The Tax Commissioner of Wisconsin* has already been referred to here.

Mr. FREAR. Many times.

Mr. FULBRIGHT. The dissenting opinion is what I am referring to. Now, Mr. Frear, you indicated you wished to ask me some questions.

Mr. FREAR. Yes. Rather than a question, I wish to make this statement. This subcommittee is not the Ways and Means Committee of the House. It is a subcommittee, not all of the members of which are lawyers.

Even though all the members of this subcommittee were lawyers, yet I would find it difficult to understand exactly what is to be accomplished by these lengthy arguments. They have all been very able arguments.

But, taking yours, for instance, you have taken an hour and a half, during most of which time we have had repetition of what has already been presented to the committee.

We have sitting on this subcommittee a lawyer who is as able as any I know, who has presented all of these propositions very clearly and very fairly both to the subcommittee and to the full committee time after time.

I give him credit for having brought out all of the arguments that have been offered here before the subcommittee.

My thought is this. I am trying to get a correct picture of the situation. All of us represent either community or noncommunity States.

Those of us who represent noncommunity States feel that this question ought to go to the Supreme Court of the United States, where nine men chosen for that kind of work will pass upon it.

You attempt, in an hour and a half, to draw certain distinctions. I am not criticizing you at all for that, except that you make your argument before this body of five men, some of whom are not lawyers, and it seems to me that we are not reaching a solution of anything; we are only taking time which is valuable to all of us.

I should like to be here and listen to all of these arguments, but I am unable to do so because of conflicting appointments.

We have had these many statements. The hearings will be printed. The cases are in the record. What is to be accomplished by proceeding further than that?

Of course, I know what your duty is, and I do not criticize you for having come here and made your argument. I understand that. I appreciate your situation.

But in a case of this kind, if it were presented to the Supreme Court of the United States, and there were this many counsel to be heard, you would each be allowed 10 or 15 minutes on the proposition. The Court would divide the time.

Mr. Fulbright has had an hour and a half himself. I call that to the attention of the committee, with all the courtesy in the world. As I have said, we have able lawyers on the committee.

Mr. HILL. Mr. Chairman, I think that is a very unusual statement for a member of the committee to make. These gentlemen are here at our invitation to give information to the committee.

I think the gentleman from Wisconsin is just as anxious to have information on the points of law and the equities of the situation as any of us who are from community-property States.

Mr. FREAR. That is right.

Mr. HILL. I cannot understand why he should inject such a statement as that into the record.

Mr. FREAR. I will explain it, if I may.

An hour and a half has been taken by one lawyer to repeat practically all the decisions that have been presented here before, that

have been presented even to the full committee, cases which Mr. Hill, with commendable zeal, has explained to the committee.

I think Mr. Hill covered it as well as it could be covered.

The present witness before the committee has taken an hour and a half. The other day another of the witnesses took an hour.

We are not a committee of lawyers. Even if this were the Judiciary Committee, it seems to me that there would not be any justification for taking so much time.

That is why I ask what is to be gained by these long discussions?

Of course, the gentlemen will realize that I am not criticizing them at all. I am merely calling attention to a situation which is disclosed by the hearings.

Mr. HILL. May I say that in the first place the gentleman from Wisconsin does me entirely too much honor.

Mr. FREAR. Not at all.

Mr. HILL. So far as any presentation I have attempted to make on the part of community States is concerned.

These attorneys have come here. They know this subject. They have presented it to the committee. They have covered various phases of the same subject, illustrating their arguments in a practical way, in a way clear not only to the lawyers, but to the lay mind, showing just what the situation is in the community-property States and its relation to the question of taxation.

May I say that this has been the most highly instructive series of sessions that I have ever attended and, with all of the study that I have been able to give the question, with the background that I have had as a resident of a community-property State, I want to say that I have gained much valuable information here that I have not heretofore been able to obtain.

Certainly the members of the committee who are not from community-property States would be even greater gainers than a member who has lived in a community-property State and has that background.

The gentleman from Wisconsin has not been inconvenienced very much. He has not been present at these sessions.

Mr. FREAR. I have been present as frequently as possible.

Mr. HILL. But the gentleman has not been here when these witnesses were presenting their cases. The gentleman was here when the witnesses sponsoring the legislation were making their statements.

Mr. FREAR. I was present one day when the other gentlemen were making their statements.

Mr. HILL. But the gentleman has not been here since the witnesses have been presenting these various cases.

I want to repeat that the statement the gentleman has made is a most unusual statement for a member of the committee to put in the record, criticizing those who are appearing here and presenting the situation from the standpoint of the community-property States. I believe the statement to be entirely uncalled-for and unwarranted.

Mr. SHALLENBERGER. I should like to make a statement, gentlemen.

I am one who is not a lawyer on this committee, but I was appointed chairman of the subcommittee. I have tried to be absolutely fair to both sides in this matter. I notified not only those who were opposed to the bill, but went to the extent of having our clerk notify the secretary of state of each one of the 40 non-community-property States, at the suggestion of my friend, Mr. Frear.

We have a great number of members from those States who have asked to appear before the committee. We have tried to be absolutely neutral in the matter.

I want to say this to my good friend Mr. Frear. If we give it any thought, I think it is easy to understand why the people from the community-property States are appearing here in relatively greater numbers and presenting arguments at greater length, perhaps, than from the other side. They are the ones who are to lose something by the enactment of this legislation. They are the ones who feel that they are directly interested.

Therefore, it is only natural, it seems to me, that they should be here with strong representation, presenting their side of the case in the very best way they know how. So I do not think we can really charge these gentlemen with going beyond reasonable lengths in appearing here and making their presentations, even if they do take quite a little while.

They are doing the best they can for the States they represent.

Mr. FREAR. Mr. Chairman, I accept the criticism——

Mr. SHALLENBERGER. It is not criticism.

Mr. FREAR. Because I asked that all these gentlemen be notified. I felt it was their duty and their right to be here.

The question occurs to me that if a court were to go through these hearings—and, of course, it will not—but if a court should go through these hearings to find out why one gentleman sitting here is paying the Federal Government $180 tax on his salary more than a man getting the same salary who happens to come from a community-property State, I am wondering if the court would get any light on that question.

That is a practical situation; it is a case of inequity. Everyone knows it. That is the one thing we are endeavoring to have presented here.

I am making no criticism. We have invited these gentlemen. But here an hour and a half is taken up with one witness, and no matter how competent he may be—and unquestionably the gentleman before us is very able—it is difficult for us to have other appointments to hear everybody at that length.

I have no criticism to make of my friend, the gentleman from Washington. I think he is a very able lawyer, and I think he has presented these cases frequently to us in the committee, so that I have a clear understanding of the distinctions in the cases.

Mr. FULBRIGHT. Mr. Chairman, may I say that I did not in the least take offense at the comment of the gentleman from Wisconsin.

Mr. FREAR. Of course, no offense was intended.

Mr. FULBRIGHT. Of course, the question of the gentleman from Wisconsin—for whom I have for a number of years entertained the highest admiration and respect, whose career I have followed with great interest, and who, I know, wants to do justice and promote equality and will do so to the best of his ability—in answer to his question may I say in partial defense of myself that I did not refer to any of these cases in my Monday's presentation, but undertook to give the practical workings of the community system in the State of Texas, which had not been done, for the purpose of showing

that the husband did not have this character of control and enjoyment that you assume, and that he never did own his salary, as the Government here stated; that he did not control it, because of the various provisions of that law.

Now, I had made an extended discussion on that, perhaps too long. I hope I did not tire the committee too much with it.

This morning I asked merely to refer, and did briefly refer, to some of these cases, from an angle that had not to my mind been connected up with the position, as I understood it, of the Government. I was just trying to make that clear.

Mr. COCHRAN. May I ask you a question at that point?

Mr. FULBRIGHT. Certainly.

Mr. COCHRAN. Taking again the example of the lawyer who earns $100,000 a year, and who is a resident of a community-property State, who has a wife with no income whatever, could the wife go to the client and demand payment of the fee?

Mr. FREAR. In Texas.

Mr. COCHRAN. In Texas; yes.

Mr. FULBRIGHT. She could not do so unless she had gone through a court proceeding which enabled her to act as femme sole.

Mr. COCHRAN. As one of the marital community, could she do it?

Mr. FULBRIGHT. She could not, because he has the control.

Mr. FREAR. If I may follow that up with a question: Could she, in the State of Texas, which you represent, go to court and say that she objected to having made a transfer of community property, real estate, in which she was interested, by her husband, providing it was to be a business transfer, and she did not sign the papers?

Mr. FULBRIGHT. She certainly could, if there was any question that her rights were being impaired or defrauded thereby.

Mr. FREAR. But she does not have any voice in it, ordinarily.

Mr. FULBRIGHT. No.

Mr. FREAR. Unless there is some impairment of her rights, she could not go into court; that is, she has no voice at all. The deed signed by you is the deed that carries the property in Texas, without the addition of her signature?

Mr. FULBRIGHT. Yes; and it would be exactly the same in Wisconsin, where you made an exclusive-agency contract, giving to a trust company or an individual the right to act with the property's owner and sell it and dispose of it and convey it.

You could not interfere with that person doing it to save your life unless you could show that they were trying to defraud.

Mr. FREAR. The marital state in Wisconsin is such that the wife must sign, she must acknowledge with witnesses, when she relases her interest in the property.

Mr. FULBRIGHT. Yes.

Mr. FREAR. But that is not true in Texas. I am not criticizing the situation, but I am giving you a picture that confronts us, and ought to confront any court, as to the question of how far community-property and noncommunity-property States should be permitted to go.

Mr. FULBRIGHT. Yes. But it is exactly analogous to the illustration that I gave you of your agent, your trustee, in Wisconsin.

While she owns it there is an agency in the person to handle it as agent as long as he does not try to defraud her.

Mr. FREAR. But this is a marital proposition entirely, and that is the only reason she acquires the property.

Mr. FULBRIGHT. It largely comes about through applying common-law concepts to the marriage relationship when we are used to the community-law concepts.

I should like to make one other observation in conclusion, Mr. Chairman, because it pertains to a question which the gentleman from Wisconsin has propounded here.

When the Government, the Secretary of the Treasury, made his report in December, he recommended that this committee give consideration to doing away with the privilege of the husband and wife to make separate returns altogether.

That would apply to Wisconsin as well as to Texas. In fact, he was having in mind to do just what the Wisconsin Legislature had done.

Mr. FREAR. Are you quoting what he said?

Mr. FULBRIGHT. I do not want to go over that again, but——

Mr. FREAR. I mean, you referred to the Secretary of the Treasury. I did not know that he had taken that position.

Mr. FULBRIGHT. In December, as shown in the revenue division hearings, 1934, at page 113—Mr. Summers went over that, and I do not want to repeat it, except to make the reference, which is as follows:

> The Treasury Department therefore recommends that the committee consider whether a husband and wife living together should not be required to file a single joint return, each to pay the tax attributable to his share of the income.

Mr. FREAR. That is right, "his share of the income." Of course, I would take his thought to be that where the wife had a separate estate, she would make a report as to her property and the husband would make a report as to his property.

Mr. FULBRIGHT. But that would not accomplish anything. That would not give the Treasury any benefit from all of these transfers that have already occurred.

If you really want to go into this thing, why not adopt the philosophy that the legislature of Wisconsin adopted, namely, to consider the family as a unit?

Mr. FREAR. It could not do that, and it would not, in any State.

Mr. FULBRIGHT. Could not do it?

Why could you not do it? Because it is taking one person's property and taxing another person on it. That is exactly what we say here. If you are going to have the constitutional question involved, why not make it universal, to apply everywhere, and let it be tested out as to all of the States.

If you did that, you would get a lot more of it; in other words, if you can tax it on that basis as you did in Wisconsin, you will get a lot more than any $16,000,000 or $28,000,000, which has been the figure suggested here.

Mr. FREAR. The Supreme Court has said that we cannot do that and, it seems to me, properly, but I do not see how, until the Supreme Court passes upon these other questions, such as salary, and things of that kind——

Mr. FULBRIGHT. If you are talking on the question of salary I might in that connection refer to a suggestion that was made by a representative of the Department of Justice, and that is that you trace back the source of the property that went into the community. Then you would have interminable administrative difficulties.

Mr. COCHRAN. Would you, considering the treatment by the Treasury of estate by entireties, and determining the Federal estate tax?

Mr. FULBRIGHT. On estates by entireties?

Mr. COCHRAN. Yes. The administrative difficulties do not stand in the way there.

Mr. FULBRIGHT. Yes: But, mind you, under the community sytem, where we have gone ahead and each has done some trading in this and that and the other, for 40 years, there is no way on earth by which you can unscramble the eggs and tell how much each contributed?

Mr. COCHRAN. You will recall that the Treasury——

Mr. FULBRIGHT. In estates by entireties they have to guess at it a good deal, as you know.

Mr. COCHRAN. But in such an unscrambled condition in estates by entireties, the Treasury in arriving at a Federal estate tax, assumes that the estate by entireties was created equally.

Mr. FULBRIGHT. And they usually have to wind up with just that assumption frequently, too, because they cannot trace it.

Mr. COCHRAN. That could be done in this instance.

Mr. FULBRIGHT. That is what we do now. That is what our law does. It assumes that it is equal. That is exactly our community law.

So far as salaries are concerned, that involves the same constitutional question as is involved in the original bill here, as to whether it is vested property.

Mr. COCHRAN. But it does not present the difficulties that are presented by an estate by entireties.

Mr. FULBRIGHT. It does not present the administrative difficulties, perhaps, to find out who earned the salary or to find out who was on the pay roll, or something like that. But it has exactly the same basic constitutional question as is involved in the original bill. I do not see that you get away from that question by just limiting it to salaries.

Mr. FREAR. Take the situation that would be presented to the court in the final determination. It would show that one man on this committee, having a $100,000 salary (which I hope he would have in just payment of his efforts) and another man sitting at this end of the committee having the same salary would have to pay 42 percent greater tax to the Federal Government; that is, for the same salary. One comes from a community-property State and the other does not.

Now, that is the question that I have in mind. The figure as given here is 42 percent difference in tax on a salary of that size.

Mr. FULBRIGHT. The simple answer to it is that it is not his salary in that State. It is not his.

And not only that, but his wife can encumber it, she can go out and buy dresses and anything she desires, and charge it. She can go off and leave him, and have the money divided. She can call him to account on it. He cannot devise it. He has not the unfettered control of it. She has the right of the economic enjoyment of her half of it. She gets it.

Mr. FREAR. Isn't this also true? Suppose this subcommittee passes on this question. Then let us say the question arises in the next Congress in just the same way. Then it will come up in the following session. And why?

Because of the inequity that is apparent on the face of it. If the Supreme Court passes upon it once, it is settled, just as it was in the Wisconsin case. That is the difference.

Mr. FULBRIGHT. We thought we had it settled with the previous administration, when we agreed to the test cases in the Supreme Court. The previous administration did not disturb that understanding, so long as they were there, and made no further effort to bring it up, because their contention was that this right of enjoyment of the husband was equivalent to ownership.

Mr. FREAR. But take a salary case.

Mr. FULBRIGHT. The salary was involved in those cases. That was one of the things in there, salary.

We sat down with the Government and tried to pick out cases that involved both salaries and dividends and other kinds of gains. It was done deliberately, because, by agreement, we sought to get these cases up, and we thought it was settled for all time, at least, so far as the Republican administration was concerned.

Now it has bobbed up again.

Mr. COCHRAN. You realize that that is just one added reason why the administration should not have changed?

Mr. FULBRIGHT. I do not think so, because they were contending that what the husband had was his, that this salary was his salary, using the exact words the gentleman here has used. The Supreme Court has said, "No; it is not his salary."

Mr. FREAR. I am frank to say that this was new to me in this session. Of course, I knew that there was a difference in the laws of the States. But the thought occurred to me that perhaps an amendment might be offered that would reach the basic proposition in some way.

Mr. FULBRIGHT. I do not see how merely limiting it to salaries changes the proposition.

Mr. FREAR. I do not know that you and I would agree on that, and I am not criticizing your position at all, of course.

Mr. SHALLENBERGER. Mr. Fulbright, along the line which my friend from Wisconsin has brought up here, we are spending a lot of time this morning on a matter which I think we have gone over pretty thoroughly.

Mr. FULBRIGHT. I have finished, Mr. Chairman.

Mr. SHALLENBERGER. There are other gentlemen here and there are some Congressmen who have been notified they would be heard, if you can finish briefly.

Mr. FULBRIGHT. I have finished, Mr. Chairman.

Mr. FREAR. Let me say this, too. I have met Congressmen coming out of this room and they have said they did not know when they were going to be called. They could not stay here, they had other appointments, too. I am not criticizing anybody taking all the

time they want, because they are entitled to as much time as anybody else.

Mr. FULBRIGHT. I appreciate the patience and courtesy of the committee.

Mr. HILL. I would like to say in this connection that Mr. Dunbar, Mr. Fulbright, and Mr. Hutcheson, of Texas, devoted most of their time on the question of the so-called "inequities" of this situation, in response to what they understood and we understood to be the main consideration of some of the members, at least, on this committee.

Mr. FULBRIGHT. That was the subject entirely of my discussion on Monday.

Mr. HILL. I regret very much that the gentleman from Wisconsin could not be here to hear that discussion. Some of the questions that he asked this morning and some that he asked of Judge Donworth the other day after he completed his statement indicated that he would have gotten the answers to those questions and the very information he desired if he had been present to hear those arguments.

Mr. FULBRIGHT. Mr. Chairman, I appreciate the courtesy and patience of the committee, and I assure the gentleman that I have taken no offense because of his criticism.

Mr. FREAR. Certainly, no discourtesy was intended. The gentleman will realize the situation that confronts us.

STATEMENT OF J. Y. FAUNTLEROY, NEW ORLEANS, LA.

Mr. FAUNTLEROY. I desire to make a brief statement and then I want to trace some of the information I have received jointly with Mr. Bartholow, the Treasury representative here, which I wish to present to the committee, because of the misinformation that appears to exist about the amount of saving of taxes that would result from the enactment of this legislation.

Mr. SHALLENBERGER. Please identify yourself.

Mr. FAUNTLEROY. My name is J. Y. Fauntleroy, of J. Y. Fauntleroy & Co., practicing taxation and accounting in New Orleans. I represent the same committee which Mr. Dunbar represents, which is a taxpayers' committee, of which Mr. C. S. Williams, of New Orleans, is chairman.

Mr. SHALLENBERGER. We have Mr. Lanham from Texas and Mr. Buck from California here, and we have promised to hear these members this morning.

Mr. FAUNTLEROY. I will not require very much time.

Mr. HILL. You are an attorney?

Mr. FAUNTLEROY. I am not an attorney; but I studied law at both Georgetown University and George Washington University, and I therefore know something about the common law. I have been familiar with the subject of community-property taxation before the first bill was introduced in 1921. I have appeared at every session of Congress or attempt of the committee to change the law since that time. Thus far no committee that has ever considered this matter has ever got a bill out of the committee; the only time it was got out of a committee was in 1921, when the taxpayers from these States

were refused the opportunity to appear before the committees, either the Ways and Means Committee of the House or the Finance Committee of the Senate, when a similar proposal to the one pending was before Congress.

Mr. FREAR. Your firm is a firm of lawyers?

Mr. FAUNTLEROY. My firm is a firm of accountants and tax consultants. I am admitted to practice before the Treasury Department. However, I am not going to make my statement too technical, though I have some familiarity with the technical legal side of the situation.

I wish, at the request of Mr. Dunbar, to ask the privilege of introducing the case of *Bender* v. *Pfaff* (282 U.S. 127). He failed to introduce it, and as it is the test case of Louisiana, and the test case for the other States have been introduced, we would like to introduce that case in the record.

Mr. SHALLENBERGER. Without objection, it may be put in.

(The case referred to follows:)

BENDER, COLLECTOR OF INTERNAL REVENUE, *v.* PFAFF (282 U.S. 1273. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT. No. 86. ARGUED OCTOBER 22, 23, 1930. DECIDED NOVEMBER 24, 1930.

Under the law of the State of Louisiana the wife has a present vested interest in community property equal to that of her husband, and under sections 210 (a) and 211 (a) of the Revenue Act of 1926, the spouses are entitled to file separate income-tax returns, each of one half of the community income. Following *Poe* v. *Seaborn* (q. v., ante, p. 101; p. 131). 38 F. (2d) 649, affirmed.

Mr. Justice Roberts delivered the opinion of the court.

The question presented in this case is the same as that dealt with in *Poe* v. *Seaborn* (ante, p. 101), *Goodell* v. *Koch* (ante, p. 118), and *Hopkins* v. *Bacon* (ante, p. 122). The only variant is that here we are concerned with the community-property law of Louisiana. The case comes here on certiorari to the fifth circuit court of appeals, which affirmed (38 Fed. (2d) 649) a judgment of the district court (38 Fed. (2d) 642) in favor of the respondent, whereby respondent recovered the amount of an additional assessment paid under protest. As in the other cases the Commissioner made this additional assessment on the theory that under the law of Louisiana the whole community income is to be treated as the income of the husband.

If the test be, as we have held it is, ownership of the community income, this case is probably the strongest of those presented to us, in favor of the wife's ownership of one half of that income. The relevant statutes of Louisiana are noted in the margin. So-called "common property" includes all property acquired in any manner by husband and wife during marriage except donations made to one of the spouses, and except the wife's earnings and actions for damages when she is living apart from her husband, or carrying on a separate business or trade. The statutes speak of a marriage superinducing as a matter of right, "partnership or community" of acquets or gains. Repeatedly the statutes refer to the relation as a "partnership or community." The decisions of the Supreme Court of Louisiana clearly recognize the wife's ownership of one half of all the community income. They unequivocally declare that the wife's half interest in such community property "is not a mere expectancy during the marriage" (*Phillips* v. *Phillips*, 160 La. 813).

As in the case of other States, whose law we have discussed in connection with this matter in the *Poe*, *Goodell* and *Hopkins cases*, *supra*, each spouse may by will dispose of only his or her one half of the community and is powerless to affect the other's half. In case of death intestate one half descends to the heirs of the decedent, and the other spouse is powerless to prevent this.

While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many States which have a community system. In Louisiana, if the husband proves, by reason of financial difficulties or the

like, an unfit manager, the wife may bring about an immediate dissolution and liquidation of the community property (*Wolf & Clark* v. *Lowry*, 10 La. Ann. 272; *Well* v. *Bell*, 24 La. Ann. 75; *Brown & Learned* v. *Smythe*, 40 La. Ann. 325). And when the wife sues for a separation of the property she is entitled to an accounting from the husband for community income or property in his hands and to reimbursement and retribution for any act done by him in fraud of her rights (*Hill* v. *Hill*, 115 La. 489; *White* v. *White*, 159 La. 1065).

In conclusion it may be noted that the Supreme Court of Louisiana has cited our own decisions in *Warburton* v. *White* (176 U.S. 484), and *Arnet* v. *Reade* (220 U.S. 311), indicating that the exposition of the wife's rights and of the nature of the community therein contained correctly states the Louisiana doctrine.

Inasmuch, therefore, as, in Louisiana, the wife has a present vested interest in community property equal to that of her husband, we hold that the spouses are entitled to file separate returns, each treating one half of the community income as income of each "of" them as an "individual" as those words are used in sections 210 (a) and 211 (a) of the Revenue Act of 1926.

The judgment of the circuit court of appeals is affirmed.

The Chief Justice and Mr. Justice Stone took no part in the consideration or decision of this case.

Mr. FAUNTLEROY. As I see, confusion in administration by the Treasury Department will result if the pending bill (H.R. 8396) is made law, and it is my hope in setting forth and stressing some of the complications involved, the committee will be able to get a clearer understanding of the inequities and difficulties which will follow.

It is to be noted the bill relates solely to individual income-tax liability, and it is assumed there is no intention to disturb the present basis of taxing the decedent spouse's half of community property for estate-tax purposes. However, as in every estate-tax return the question of the decedent's individual income-tax liability is involved, the pending proposal would appear to create a contingent liability in Louisiana when the husband survives the wife and in other States when either surviving spouse has the administration or control of any community property.

In the foregoing cases although the marital community will have ceased, the contingent liability for the deceased spouse will not be determined until the surviving spouse's individual income-tax liability is established and such liability will be merged and dependent on the surviving spouse's separate income, if there be any. Moreover, in Louisiana a similar complication will occur in connection with divorce or other dissolution of the community property partnership during the lives of the spouses. Indeed, a situation will be created which will raise technical and extremely difficult legal questions and possibly require for solution decisions of the highest courts relative to the settlement of the marital community partnership. And so far as I am informed no similar hiatus occurs under the Federal laws involved. Such questions are now avoided by recognition by the Treasury Department of State law in its application to property rights.

It is to be borne in mind that the marital community partnership comes into being at marriage with no capital and possessed of no income but with the presumption that certainly income will accrue and capital be created. And it is contemplated that the terms of the partnership contract which are clear and definite may be applied at any time to require an accounting statement of the financial condition of the partnership and that for every marriage to which community property is attached a final accounting is to be had at dissolution of the partnership, which takes place at the death of either spouse or on divorce or separation of bed and board, or merely on separation of property, in which latter case the marital relation continues.

A marital community partnership also comes into being when nonresidents establish a residence in Louisiana, unless advantage is taken of the privilege granted by law of entering into an agreement within 1 year of the establishing of such residence not to have a community partnership of acquets and gains. And, similarly, this privilege is given on marriage to residents of Louisiana should they see fit to enter into a marriage contract abolishing or varying the terms of the marital community partnership provided by law.

It, therefore, appears inequitable for Congress by legislation to treat differently the community partnership entity clearly defined by the law of the eight States involved from marital partnership entities created and permitted under the laws of the remaining forty States of the Union.

Mr. FREAR. Would it disturb you if I asked a question?

Mr. FAUNTLEROY. No, sir.

Mr. FREAR. If I understood you correctly, the parties, that is, the husband and the wife, can vary the terms of the marital community partnership?

Mr. FAUNTLEROY. Only before contracting marriage. After marriage is contracted there can be no variation in the slightest particular.

Mr. FREAR. They can change the law prior to marriage?

Mr. FAUNTLEROY. Prior to the marriage.

Mr. HILL. That is in Louisiana.

Mr. FAUNTLEROY. Yes; that refers to Louisiana.

Mr. HILL. That does not obtain in all of the community-property States?

Mr. FAUNTLEROY. No. I wish to say this, interpolating, that if I get into too deep water legally and I make any misstatement of the law, I want to ask Mr. Dunbar to correct any such misstatement I may make.

Mr. FREAR. The statement relative to varying the terms of the contract is very interesting.

Mr. COCHRAN. With reference to your statement, Mr. Hill, that some of the community-property States do not permit husband and wife to refuse to be bound by the community-property law, in such States could they not accomplish the same purpose by a prenuptial contract?

Mr. HILL. No; they could not in my State. I cannot speak with respect to all the other States, but they can in Louisiana. They fix it before marriage, but after the marriage is consummated, then the law operates and they are powerless to modify it.

Mr. FAUNTLEROY. Common-law or noncommunity States marital partnerships are frequently designed to secure income-tax advantage, and have inherent in them all of the complications for administration of income taxation claimed to exist in the marital community property partnership. Nor is it just to set aside the laws of the community-property States which define property rights therein for husband and wife, while Congress recognizes the laws of the common-

law States defining property rights of husband and wife of those States. Example after example, if need be, can be furnished of the recognition by the Treasury Department and the courts of various legal devices and agreements adopted to lower individual income taxes by married couples in all of the noncommunity-property States of the Union.

Mr. FREAR. That is one of the things we have tried to cure.

Mr. FAUNTLEROY. It has not been cured except to a degree. I think I can show that you are chiefly curing the Mitchell case proposition, but in many other instances tax manipulation has not been touched. You can read the opinions of the Board of Tax Appeals, and case after case comes up where the principle is tested and the State law survives if the agreements or transactions are legal.

It is taken for granted that the committee has in mind that the present basis of community-property taxation may at times produce a greater tax rather than a less tax, depending on the amount of separate income which either spouse may have. Under the present basis of reporting income from a marital community partnership, if a separate return is filed by the wife, she is compelled to add half of the community income to the amount of her separate income, and in cases where her separate income is much larger than the husband's, a larger combined tax results for the spouses by reason of the present basis being applied to require each spouse to report one half of the community income. Also, the proposal in the pending bill in the case of the couple cited would cause the combined taxes to be less if the separate income of the wife were sufficiently great.

Again, it can be urged with equal fairness if husbands and wives in the community-property States are to be penalized by a special amendment relating only to them, similarly it would be fair for provision to be made to penalize husbands and wifes of common-law States who pay less income tax by taking advantage of the legal devices permitted by the law of their State. In other words, a joint return is now filed by married taxpayers of considerable income only when they save income tax by so doing. A husband may have had a loss in his business. He may be in the red. He may have a wife who has considerable income. In that instance they would file a joint return and the Treasury would lose the income tax it would have received on the wife's income. And a similar privilege exists if the husband has income and the wife has suffered a loss of income.

Mr. SHALLENBERGER. Is that permitted by the administration in the Treasury Department?

Mr. FAUNTLEROY. It is.

Mr. SHALLENBERGER. Is there any way in which such a practice can be stopped?

Mr. FAUNTLEROY. That is the provision that Mr. Morgenthau brought to this committee, of requiring a mandatory joint return for the spouses in all of the 48 States, and I am going to discuss it later.

Another point is that in Louisiana all income from separate property—and listen to this, please—except capital accretions; that means, if a man had a plantation or a piece of real estate when he married and it afterward increased in value and he sold it at a

profit, that increase is capital accretion; that profit would be his separate income. All income from property except capital accretion which the husband has on marriage or acquires after marriage by gift or inheritance is income of the marital community partnership. He could have a million dollars when he married, and one half of the entire income from that million dollars that he had before marriage would belong to the wife, as the whole of the income would fall into the community partnership in which the wife has an equal interest with the husband.

Mr. FREAR. But the million dollars is his separate estate.

Mr. FAUNTLEROY. The million is his separate estate, but the income therefrom is community property, and he cannot remove himself from that burden except by making a marriage contract in advance of the marriage. While marriage contracts are common in France, they cause embarrassment in America. Also, all the income from the separate property, except capital accretions, of the wife which is administered by the husband—bear in mind I say "administered by the husband"; that is to say, if she permits him to administer it—then the income from her separate property falls into the community partnership income. Likewise, the earnings from personal services of either spouse fall into the marital community, as do the profits of a business conducted by either spouse even though the capital producing the profits is separate property.

Furthermore, and unlike marital partnerships permitted by common-law States, once the marital community is established, the terms of the partnership cannot be varied by mutual agreement, but must continue until dissolution is provoked. Again, all gifts between husband and wife are revocable by the donor. Those features are stressed to illustrate the scope of the terms of the marital partnership agreement so that the committee may understand how far-reaching they are and realize the harshness of the result sought to be accomplished by the pending proposal and appreciate the inability of community property husbands and wives to acquire a property status similar to that permitted to a husband and wife of certain common-law States.

Think of this: you are forcing by this proposal a woman who may run a millinery shop on her own capital to put the profits from that business into the husband's return; not the husband's share only, but you are forcing her to put all of the profits into his return because under the law he has the legal right to administer and control the income which would be community property. The husband for income tax would be bound by his legal right.

Mr. SHALLENBERGER. You do not think the language which says ownership, management, and control will be the controlling factor that will protect her in her business.

Mr. FAUNTLEROY. I do not think the Treasury officials would so advise you.

Mr. SHALLENBERGER. Isn't it her actual management and control?

Mr. FAUNTLEROY. I am talking about the law of the State, as distinguished from what you were talking about. There is no way to change the husband's right of administration and control in Louisiana except for the legislature to change it. I think the committee understands that in several of the community-property States ad-

ministration and control have been changed from one spouse to the other. I wish to say that, as far as this bill is concerned, where it is practical to do so, and if the legislature saw fit to do so, it could practically make nugatory the very provision that you are now seeking to write into the law.

Mr. FREAR. By what procedure?

Mr. FAUNTLEROY. By passing legislation that the wife's earnings from the community property shall be placed in her.

Mr. FREAR. But the Supreme Court would decide that.

Mr. FAUNTLEROY. Of course. The Supreme Court would have the power to decide but the Supreme Court would recognize the control had been changed. The sovereignty of the States put them in position to change their laws; unless you are going to write a new kind of a tax law—one, if you will pardon my saying so, that will enable Congress to "snap its fingers" at all property rights of every kind, sort, and character as defined and determined by State law.

Mr. FREAR. It is conceivable, but this is separate property, which has been separate property, irrespective of the decision of the legislature, and it belongs to the spouses.

Mr. FAUNTLEROY. Not according to this proposal; the income from the husband's separate property is under the control of the husband and the income from the wife's separate property may be. It does not necessarily mean her personal earnings are actually demanded by him, but he has the legal control of them.

Mr. FREAR. I am speaking more particularly about the Wisconsin case.

Mr. FAUNTLEROY. I will come to that.

Mr. FREAR. We have had several witnesses dwell on that.

Mr. FAUNTLEROY. I am going to dwell on what the Treasury Department said about it.

A striking instance of the extent to which the proposals incorporated in the pending bill will lead is found in the following example which while similar to one heretofore given to the committee, is a more forceful illustration of the complication that will arise when a change of residence is made from Louisiana to a common-law State. Suppose a husband and wife have accumulated $500,000 of community property which is invested in stocks and taxable bonds. In Louisiana the husband would have to report all of the income therefrom, but in the common-law State each of the spouses would be permitted to return for income tax one half of the income received from this identical property.

In other words, a situation would be created by the Federal income-tax law which would encourage an exodus of very prosperous couples from Louisiana or other community-property States. And the anomaly would exist of the Federal Government's recognizing for Federal income tax the rights acquired under the community-property States law of former residents of such States who had removed to common-law States, while at the same time overriding the community-property law for residents of the community-property States. Surely the creation of such result does not produce an equitable and uniform basis of taxation. You could take two couples identically in the same position, one having removed to New York. The one that removed would get the tax advantage and the one that stayed in Louisiana would be penalized.

Mr. HILL. In Louisiana, the husband and wife, under the example you cited of $500,000 accumulation of stocks and bonds, the income from that $500,000, under the provisions of the bill, would be taxable to the husband.

Mr. FAUNTLEROY. That is right.

Mr. HILL. Although one half of that accumulation belonged to the wife and the other half to the husband. If this married couple with that property should move to the State of New York, the State of New York would recognize the one-half interest of the wife and the one-half interest of the husband, and the Federal Government would recognize that one half belonged to the wife and one half to the husband and would tax to each of them his or her share of the income, whereas in Louisiana, under this bill, it would all be taxed to the husband.

Mr. FAUNTLEROY. Yes.

Mr. SHALLENBERGER. I asked the very distinguished Senator from Texas that question, and, if I understood him rightly, his judgment was that the same rule would apply in the State of New York, as far as the Federal taxes were concerned, for the reason that management and control, being of sufficient degree, was the warrant for the Government requiring a single return. Why should not that apply in New York as in every other State, for if the management and control were sufficiently definite, that rule of law would not apply.

Mr. FAUNTLEROY. Property rights are recognized in the common-law States; the community property is recognized there as absolutely vesting the wife's rights in her to one half thereof. And the tax on it, under numerous decisions, has been just as I stated.

Another complication that follows from the adoption of the pending income-tax proposal will arise in Louisiana in connection with the receipt of the wife of her share of the community property on the dissolution of the marital community partnership. She acquires the community property neither as a gift or a devise; she has been assessed and has paid no income tax thereon while it was being accumulated and the question is raised, does she receive it free of tax by reason of the husband's having annually included her share of the community-property income in his return and paying such tax as was due by him, and, of course, he would be required to add the community income to any annual separate income he may have received. Now, that may be a fictitious assumption in the sense that the question has not yet arisen, but it is very practical, when you start letting my income tax be paid by somebody else, unless I am bound by law of some kind, to have a part in the liability. Therefore, when I get the property which does not come to me as a gift, or by inheritance, does not a hiatus arise. I know of no other situation in law where that is allowed. Perhaps some of these lawyers can differentiate it.

Relative to the Ohio case, which held that because the wife was not known to the other partners, that fact made the husband liable for the whole tax; I do not know just what happened after that; whether if she had gone in and enforced her right to the control of the property it would be ruled that for income-tax purposes it was tantamount to being a gift.

Mr. HILL. In that case the decision was that there was not any partnership and that she was not a member of the partnership. It

requires the consent of the members for the admission of a new partner.

Mr. FAUNTLEROY. If she had a legal right to get her share, the question is, when she gets it, does she have to pay a tax on such profit as she makes from the contract?

Additional complications will follow in those cases in which management and control of certain of the community property is in one or the other of the spouses. No complications arise now under the present basis in connection with the income of the marital community, as its profits or income are accounted for and rendered for income tax on the basis applied to common-law State marital partnerships or ordinary commercial partnerships everywhere.

I suppose the committee understands the basis of a commercial partnership, that the various partners render, in their income-tax returns, their share of the profits from that partnership, whether actually distributed or not. That is very similar to some situations that can arise in this community-property partnership, but for ordinary partnerships, whether they be marital partnerships in noncommunity States, or ordinary commercial partnerships, every partner must include his share of the annual partnership profits in his return.

Mr. COCHRAN. Can this marital partnership of which you speak be created in all the 40 noncommunity States?

Mr. FAUNTLEROY. My impression is it cannot, but it can be created in a great many more States that is now the case and perhaps in all by proper legislative enactment.

Let me give an illustration of an apartment house owned in New York, acquired in this manner: The wife happens to inherit $50,000. The husband happens to have saved $50,000. They see an apartment house that they wish to buy as an investment. The trade is made, the husband manages and controls the property, talks to the real-estate man about it, collects the rent, and, in fact, is the administrator, not necessarily the legal administrator. In that case the rents and profits from that apartment house would, in New York, go half and half in the return of each, because they would be the joint owners of the apartment house. In Louisiana, under the identical situation—you do not need to change the facts at all—under the present community-property basis, half of the profits would go in each of the spouse's return, while under this law, if passed, all the profits would go in the husband's return.

Mr. FREAR. Let me understand; if the husband and wife in Louisiana, each having $50,000 of which you speak——

Mr. FAUNTLEROY (interposing). I am assuming it is separate property in both cases.

Mr. FREAR. I am trying to follow you. Each has $50,000 in their own separate property, coming to them, not from the operation of community laws but from——

Mr. FAUNTLEROY (interposing). Inheritance.

Mr. FREAR. That comes in and the husband then makes a joint return and is responsible for all.

Mr. FAUNTLEROY. Under the proposal, the husband has to. In Louisiana he would be the administrator.

Mr. FREAR. He does not now?

Mr. FAUNTLEROY. He does not now, but you are leaving the husband alone in New York, and as far as the practicalities go there is no difference in the two situations.

Mr. FREAR. I am wondering if you are correct in your inference of what that would carry.

Mr. FAUNTLEROY. I ask the Treasury representative to correct me if I am wrong.

Mr. FREAR. We have your explanation of it; I do not suppose they would undertake to pass upon that.

Mr. FAUNTLEROY. If you want the illustration confused a little more, I would be glad to confuse it for you. It can be confused by the husband having $50,000 in community property. In that case, the wife would have three quarters of the property in fact, and the husband only one quarter, but all the income from the property would have to go in the husband's return, under the pending proposal.

Mr. HILL. That is, under the proposed bill?

Mr. FAUNTLEROY. Under the proposed bill; yes, sir. I do not think it is constitutional; I am not a lawyer; I am not talking as a lawyer, except I have some conception of legal principles.

Mr. SHALLENBERGER. You know the courts by experience?

Mr. FAUNTLEROY. To some extent. Now, as to the need for this legislation, and I am trying to simpify some of the discussion so that we can find out what is involved in dollars and cents, as far as revenue in the Treasury is concerned.

Mr. SHALLENBERGER. You are going to analyze as to what would be the result in revenue to the Treasury Department if this law is put into effect?

Mr. FAUNTLEROY. I am going to question, and give my reason for doing so, the exaggerated estimates of 50 million and 60 million which have appeared in this record. That was in the minds, apparently, of all parties when the discussion began, and it has, for the time being, been reduced to $18,000,000 in normal times, and possibly $28,000,000 under some theories that are not explained. It is accordingly in the air, whether there are $28,000,000 involved or $18,000,000.

Mr. FREAR. There was an effort to explain that.

Mr. FAUNTLEROY. You lost rapidly 42 millions, and then with equal rapidity, you ran up the $18,000,000 to 28 millions.

Mr. SHALLENBERGER. You would not dispute that the income to this Government might increase twice as much as it is now, and then the amount would be doubled.

Mr. FAUNTLEROY. I am going to come to that. I will take 1929; I am also going to take a poor year.

Mr. FREAR. Is it very material whether it is 1 million or 28 million?

Mr. FAUNTLEROY. It might be.

Mr. FREAR. I do not believe you or I can analyze it.

Mr. FAUNTLEROY. I am going to attempt to give my interpretation of the relative merits of the original Treasury Department proposition involving 40 millions.

Mr. FREAR. That is considered somewhat overdrawn.

Mr. FAUNTLEROY. In 1921 we had no hearings on the part of taxpayers on a provision similar to this before the Ways and Means Committee, and the provision was inserted in the law. It went over

to the Senate, passed the Senate and came on the floor of the Senate and was eliminated by actual vote of the Senate, due to the activity of the 16 community-property State Senators, both Republicans and Democrats, at that time.

Mr. FREAR. There were the same number of States at that time that had the community-property system?

Mr. FAUNTLEROY. There were eight, and they have not increased in number since the discussion arose. However, California was unfortunate in having a legal status which the Treasury Department recognized and which the Supreme Court recognized that prevented California community income from being divided until their Supreme Court decision of January, 1931 (*U.S.* v. *Malcom*, 282 U.S. 792). As a consequence of this decision, the rule applicable to return of community income by California taxpayers is the same after July 29, 1927, as that for taxpayers of the other community property States. I am going to introduce into the record a letter of October 27, 1921, from Commissioner D. H. Blair, Commissioner of Internal Revenue, addressed to Hon. Joseph E. Ransdell, United States Senator, who was the senior Senator at that time from Louisiana, and whose secretary, as a young man, I was. I shall not attach too much importance to the letter, but the committee can draw its own inferences. I do not know whether you want me to read it or not.

Mr. SHALLENBERGER. What is it in reference to?

Mr. FAUNTLEROY. It is in reference to the saving involved in the community-property legislation. Do you wish it read?

Mr. HILL. Yes; please read it.

Mr. FAUNTLEROY. It is dated October 27, 1921, and is addressed to Hon. Joseph E. Ransdell, United States Senate [reading]:

Reference is made to your letter of October 24, in which you call attention to the community provision in the pending revenue act and state that in connection with your consideration of the provision you are anxious to obtain the following information: The difference in total revenue from each of the community-property States, assuming similar income reported for 1920 or the last year for which statistics are available, that will be produced under the law as it now is and under the proposed amendment based: (1) On the rates of taxes contemplated in the pending bill for 1921; (2) for 1922 under the rates proposed in the bill as it left the House; and (3) under the rates as adopted by the Senate on Saturday last.

As indicated in my letter to you dated October 26, there are no statistics that would shed light on these questions. I have asked Mr. McCoy, the actuary for the Department, for some estimates which might be of value to you. He advises me that the percentage of separate returns by wife of total returns is:

In community States, three tenths of 1 percent.

In these States plus California, fifty-five one hundredths of 1 percent.

In the United States, eight one hundredths of 1 percent.

The percentage of separate returns by wife of joint returns by husband and wife is:

In community States, seventeen one hundredths of 1 percent.

These States plus California, ninety one hundredths of 1 percent.

Total United States, 1.04 percent.

Mr. McCoy advises "the answer to the query as to the gain in revenue by the amendment is that very little additional revenue will be gained possibly not over \$5,000,000." This Bureau and the Treasury Department do not vouch for the accuracy of the statistics or of the estimates furnished by Mr. McCoy. The percentages are not based upon statistics for the year 1920 since no statistics whatever are available with respect to those returns.

Mr. FREAR. Of course, the rates are entirely different now.

Mr. FAUNTLEROY. I think unquestionably the rates are higher for 1921. I did not have the time to do it, nor the assistance available to go into all of the details involved. Of course, this committee, I think, should have the variation in these rates.

Mr. HILL. The war-time rates were in effect at that time.

Mr. FAUNTLEROY. The rates in 1919 were the highest of all. Then they reduced the rates some in the 1921 Revenue Act, but the surtax rates for the year 1921 were the same as the 1919 rates, and then the Mellon plan came on in 1923 reducing the rates still further.

Mr. SHALLENBERGER. If I recall, Mr. Fauntleroy, somebody gave us these figures, not only those you have given us, but figures for succeeding years.

Mr. FAUNTLEROY. But they were general statements. I am making it not hearsay as to what Mr. Mellon said would be saved in 1924. Under date of November 10, 1923, Mr. Mellon, Secretary of the Treasury, addressed a communication to Hon. William R. Green, in which he recommended, as recommendation no. 6, "tax community-property income to the spouse having control of the income" and he estimated it would increase revenues by \$8,000,000. As I stated, the Ways and Means Committee held public hearings and refused to adopt the recommendation of the Secretary.

Mr. SHALLENBERGER. I am quite sure that statement has been put in already.

Mr. FAUNTLEROY. I think it is in. I think it has been stated as 9 million; I do not know exactly what the correct figure is.

Coming down to the 1934 revenue revision hearings, with which you are all familiar, I am going to quote from a statement submitted to the Ways and Means Committee by the Secretary of the Treasury, appearing at pages 112 and 113, Mr. Magill being the representative of the Department. Mr. Magill quoted Secretary Morganthau as follows:

Under the present law, a husband and wife living together may, at their own option, make separate returns, or may make a single joint return. If each has an income of any considerable size, each will ordinarily make a separate return, in order to reduce the normal tax, and, more particularly, the surtaxes which would otherwise be payable. The family income is, in fact, frequently extended and otherwise treated as a unit.

I wonder what he means by that, unless he means the husband is the head of the family and runs the family.

Nevertheless, if the husband and wife can so arrange their affairs that the wife is in receipt of a portion of the family income, income taxes can be considerably reduced. In other words, the present privilege of filing separate returns operates to that extent to defeat the progressive rate schedule, particularly in the case of the larger taxpayers.

It is evident that this situation is the direct cause of numerous transfers, sales, assignments, and other arrangements between husbands and wives which have no real basis and are made because of a desire to avoid income taxes otherwise due.

He then made a reference to the marital community-property laws of the 8 States affected.

Mr. HILL. You say, "8 States affected"; affected by what?

Mr. FAUNTLEROY. The 8 States which have community property.

Mr. HILL. Affected by this bill?

Mr. FAUNTLEROY. That is correct.

Mr. HILL. Mr. Magill was talking about all of the 48 States in his statement which you have just read.

Mr. FAUNTLEROY. I think that is clear. He also made a reference, after talking about what was happening in all of the non-community-property States, to the savings which were being obtained in community-property States by reason of dividing community property. Here is the recommendation:

The Treasury Department, therefore, recommends that the committee consider whether a husband and wife living together should not be required to file a single joint return, each to pay the tax attributable to his share of the income. Such a provision has long been in force in other countries. Our estimates indicate that, on the present rates, the suggested change would directly account for an additional $40,000,000 of revenue, besides discouraging innumerable colorable transactions and eliminating present inequities.

Mr. COCHRAN. What is your opinion as to the advisability of that proposal?

Mr. FAUNTLEROY. Of what?

Mr. COCHRAN. Of the proposal which you have read.

Mr. FAUNTLEROY. I think, as a layman, if it can be legally done, which I doubt, by reason of this Wisconsin case, that you would have at least what would be called uniform taxation. I do not think it is necessary to do it, because ever since 1913, when the income-tax law came into effect, it now being 1934, the people have become accustomed to another basis, and unless you can support it with a very detailed estimate it should not be done. I would not advise doing it on some such estimate of $40,000,000 saving. It has to be gone into carefully, and estimates should be presented that will show the exact figures by States. The Statistical Bureau of the Treasury can assemble that information; it can be done and it is important to be done, if you are seriously thinking of changing the present basis of taxation.

Mr. SHALLENBERGER. I would like to interject a statement at this time. Mr. Hill has referred to the fact that certain testimony of the Secretary was directed toward all of the States. I raise the question with you here, whether or not this bill would not apply in fact, if enacted into law, to the 40 other States as well as the community-property States? I raised that question in the first part of the discussion and the representative of the Treasury Department agreed with my friend, Mr. Hill, that it was only intended to affect the eight States. That is the judgment of the Treasury Department, as I understand it, and I was raising the question whether or not we would have to go further to include the other States.

Mr. FAUNTLEROY. I think it applies to the eight community-property States. If there is any interpretation to the contrary, it seems to me the Department of Justice ought to give a ruling on that point before we assume it applies to other States.

In speaking of the Wisconsin case and the constitutional right to adopt this exclusive joint-return basis, or mandatory joint-return basis, Mr. Morgenthau said, after speaking of the Wisconsin case:

The case is not, however, conclusive for two reasons. In the first place, the Wisconsin law was evidently interpreted by the court as requiring that the husband should pay the tax on his wife's income. This objection can be eliminated by proper draftsmanship specifying otherwise. In the second place, the Federal Government is not under the same constitutional restrictions as the States in this respect.

I have read the hearings where that discussion came up, and I am free to confess that I got the idea that the Federal Government was under the same constitutional restrictions. Perhaps the author of this memorandum can show why it can be done.

Mr. HILL. I will say that the decision in *Heiner* v. *Donnan* (285 United States Reports) says that the Federal Government is under this same restriction.

Mr. FAUNTLEROY. Yes.

Mr. SHALLENBERGER. You have taken about 20 minutes on these matters.

Mr. FAUNTLEROY. I am coming to the end.

Mr. SHALLENBERGER. These matters to which you are referring we have already had presented.

Mr. FAUNTLEROY. I do not think you have had these matters which I am going to point out now.

Mr. SHALLENBERGER. I mean the references to the former decisions and the quotations. In the interest of these other gentlemen here, who desire to be heard——

Mr. FAUNTLEROY (interposing). I am sorry to occupy so much time.

Mr. HILL. I am sure the gentlemen would be glad to defer to the wishes of the members, in order that the witness might make the presentation of the points he is coming to.

Mr. FAUNTLEROY. It is to be noted that the estimate of 40 millions applies to the entire 48 States. When I realized that that was the case, for I heard the committee members and Mr. Treadway speaking of 50 millions and Mr. Frear of 60 millions, it occurred to me that somehow these eight community-property States, by reason of this special provision, would pay a great deal more than they would on the joint-return basis, because the 40 millions was the entire estimate made for the 48 States.

I, therefore, discussed the matter with Mr. Bartholow and he very kindly made it possible for me to see Dr. Burr, of the section of financial and economic research, and Mr. Bartholow was present at this conference. Dr. Burr explained that the Treasury estimate for the 8 community-property States involved in the total estimate of $40,000,000 for the entire 48 States is but $10,000,000, or one fourth of the entire amount. The estimate was based on actual statistical data within the Department, and it is my view that the matter is of such importance if there is a disposition on the part of anyone to seek to raise the estimate on an unexplained basis the committee would be warranted in calling for detailed——

Mr. SHALLENBERGER (interposing). This is your statement; that is not made by the Treasury Department?

Mr. FAUNTLEROY. Mr. Bartholow was present.

Mr. SHALLENBERGER. That observation about what the committee should do is your observation?

Mr. FAUNTLEROY. I am speaking for the citizens of my State, and the attitude they would take. It seems to me if you are going to change the basis of taxation affecting millions of taxpayers in the United States on the assumption you are going to save 40 millions, that there should be accurate information.

Mr. SHALLENBERGER. That is the point I wanted to bring out. That was not the statement of the Treasury Department, that they thought we ought to get the real facts.

Mr. FAUNTLEROY. Not at all. I think the Treasury Department has the actual estimates, though I did not see them. I do want to call attention to this fact, though, that if a joint-return basis from all the eight community-property States would produce only $10,-000,000, or one quarter of the whole, it is to be presumed that this present proposal will produce a less amount than that, unless the rates of tax for surtax have been materially increased, because in the State of California and other States where large amounts of separate income can be returned by the spouses, there would be less income to be subject to tax on the pending proposal than would be the case from the joint-return basis. I have some tables here that I can just introduce.

Mr. HILL. If it is not too long, read it, because we do not always read the record.

Mr. FAUNTLEROY. The only report I have found in my examination of the statistics indicated by the Treasury Department in which the actual amount of community-property tax is set forth is in the report of the Treasury Department, United States Internal Revenue, statistics on the income for 1921.

Mr. SHALLENBERGER. Haven't you reports for later than 1921?

Mr. FAUNTLEROY. This is the only one fixing the amount of tax. Community-property income is reported but the statistics show the tax thereon only for 1921. Let me explain that.

Mr. HILL. Here we have a date which probably more nearly compares in the rate of tax with the rate which we now have, than if you took some subsequent years. We had the war-time tax in 1921.

Mr. SHALLENBERGER. May I interject to say that I thought we had the figures for 1931.

Mr. FAUNTLEROY. I have some figures for 1931. I have as complete figures as the public statistics reveal.

In 1921 this report showed that there were 24,094 community-property returns filed, which were 0.36 percent of the total number of returns filed; that the amount of income subject to tax was $175,-684,785; that it was 0.90 percent of the whole amount of income reported for that year, and the tax was $11,629,922, or 1.62 percent of the total amount of taxes collected.

I draw attention to that figure for the purpose of comparing it with the estimate of $5,000,000 of Mr. McCoy as to the amount of revenue that would be lost by application of the community ruling for that year. A 35 percent increase for the entire $11,629,922 would be under the amount estimated by Mr. McCoy.

For 1921 the Treasury statistics show a community income of $175,662,785; and total amount of net income $19,577,212,528.

The 1925 community income was shown to be $261,209,721, or 1.19 percent of the whole amount, which was $21,894,576,403.

In 1928 there was $660,106,747 of community-property income, which was 2.61 percent of the total amount of the income, which was $25,226,326,912.

In 1929 the total amount of community-property income was $647,799,247, or 2.61 percent of the total amount of the income, which was $24,800,735,564.

In 1931 the total amount of community-property income was $293,040,437, which is 2.15 percent of the total amount, $13,604,-996,128.

I have the total amount of tax paid by these community-property States, and the total surtaxes paid for 1921, 1929, and 1931. It will be seen that in these States, exclusive of California, the total individual income-tax was $24,573,493, for the year 1921; that the total surtax reported in that year was $8,963,077.

Mr. SHALLENBERGER. Your figures are to form a basis of an estimate of how much additional revenue will be received from community property if this bill goes into effect.

Mr. FAUNTLEROY. That is right.

Mr. SHALLENBERGER. What would be your estimate of it?

Mr. FAUNTLEROY. I was coming to the year 1931. There was $12,695,972 of surtaxes paid in all of the eight States, including California. So, I cannot see how in that year that the saving could have been more than—as I say, it is a hit and miss proposition, if you estimate 35 percent more the saving would be less than $4,500,000, if that is true.

No mind can make an accurate estimate without the statistics on which to go into all that. You can do like you have done, compare the income of certain States and then try to draw certain deductions from that. But of course the difference in tax savings depends on the graduated rates of tax and the income that would actually be reported.

Mr. SHALLENBERGER. Are these figures to show that we cannot determine anything from statistics, or to show that you have an opinion concerning them?

Mr. FAUNTLEROY. They are to show that the total taxes paid by all the States, if you take as an example 1921, the first year in which is reported separately community property on that analogy alone, it would appear you could not under normal conditions and rates of tax expect to get a saving far in excess of the estimate, at least, that the Treasury Department makes.

Mr. SHALLENBERGER. That is the point I am trying to get. Did Mr. McCoy give you an estimate, or have you an estimate of what he thought?

Mr. FAUNTLEROY. He said $5,000,000.

Mr. SHALLENBERGER. Do you feel that is a fair statement, or do you have a different opinion, after your close study of it?

Mr. FAUNTLEROY. I think for 1921 that was an eminently fair opinion.

Mr. SHALLENBERGER. Is that estimate under present conditions or for 1921.

Mr. FAUNTLEROY. His estimate was made under returns and statistics available as of the year 1921. He said 5 million.

Mr. SHALLENBERGER. You have not anything since that?

Mr. FAUNTLEROY. Now, in 1921, notice this: The total individual income tax paid for all the States was $61,011,925, whereas for 1929 it was $68,817,866, or there had been an increase in tax, apparently, if my figures are correct, of only about $7,800,000. The total tax for 1931 shrunk to $22,256,282 for all of the States involved. The surtaxes for all of these States in 1929, combined surtaxes, were $36,280,210. You must take into consideration a great deal of income

subject to surtax is income of single individuals and also separate income of one or the other spouse.

Mr. HILL. And separate income returns of the married people?

Mr. FAUNTLEROY. Yes. There is not as much money involved, by anything like the amount, as I see it, as the general impression indicates.

Mr. SHALLENBERGER. The time for adjournment has arrived.

Mr. FAUNTLEROY. I am about through with all the statistics I have.

Mr. SHALLENBERGER. You have further tables to present?

Mr. FAUNTLEROY. No; I am practically through.

Mr. SHALLENBERGER. Do you wish to file that statement?

Mr. FAUNTLEROY. Yes; I would like to.

Mr. HILL. You may revise it and give it to the reporter.

(The tables referred to are as follows:)

EXHIBIT A

TABLE 1

The following table has been compiled from data contained in table 4, page 46, of the Statistics of Income (United States Treasury Department, Bureau of Internal Revenue) for the year 1921:

State	Community income		Total income		Percent of community income to total income
	Number of returns	Net income	Number of returns	Net income	
Arizona	787	$4,167,116	18,477	$48,310,197	8.62
Idaho	628	3,422,823	22,976	49,737,718	6.88
Louisiana	6,620	45,719,750	67,960	197,897,146	23.10
Nevada	145	1,046,164	9,719	22,455,508	4.66
New Mexico	377	2,268,119	11,780	27,838,165	8.15
Texas	9,863	81,228,823	200,188	536,897,427	15.13
Washington	5,324	33,758,272	115,688	262,109,642	12.88
Total	23,744	171,611,067	446,788	1,145,245,803	14.98
California	350	4,073,718	386,082	1,168,021,448	.35
Total	24,094	175,684,785	832,870	2,313,267,251	7.59
All other States			5,829,306	17,263,945,277	
Total	24,094	[1] 175,684,785	6,662,176	19,577,212,528	.89

[1] Statistics of Income for 1921, page 5, reports that the total tax paid on the community income was $11,629,922, or 1.62 percent of the total tax of $719,387,106 collected on all personal returns for that year.

EXHIBIT A

TABLE 2

The following table has been compiled from data contained in table 4, page 68 of Statistics of Income for the year 1929:

State	Community income		Total income		Percent of community income to total income
	Number of returns	Net income	Number of returns	Net income	
Arizona	1,225	$15,395,341	12,448	$60,788,434	25.33
Idaho	717	6,933,196	9,830	38,525,958	18.00
Louisiana	3,830	49,811,063	35,093	170,713,998	29.18
Nevada	357	3,799,442	5,174	21,597,783	17.60
New Mexico	630	6,175,192	6,874	30,875,636	20.00
Texas	14,771	201,873,023	113,555	592,518,704	34.07
Washington	5,372	80,247,961	65,240	302,258,404	26.55
Total	26,902	364,235,218	248,214	1,217,278,917	29.92
California	15,887	283,564,029	309,047	1,689,896,424	16.78
Total	42,789	647,799,247	557,261	2,907,175,341	22.28
All other States			3,487,066	21,893,560,223	
Total	42,789	647,799,247	4,044,327	24,800,735,564	2.61

EXHIBIT A

TABLE 3

The following table has been compiled from data contained in table 4, page 66, of Statistics of Income for the year 1931:

State	Community income		Total income		Percent of community income to total income
	Number of returns	Net income	Number of returns	Net income	
Arizona	449	$4,722,000	8,035	$28,745,823	16.43
Idaho	200	1,668,000	5,864	18,350,071	9.09
Louisiana	2,015	21,626,000	28,934	107,673,824	20.08
Nevada	190	1,617,000	3,431	14,041,657	11.52
New Mexico	250	2,181,000	5,389	18,231,469	11.96
Texas	6,780	79,584,000	89,158	333,673,467	23.85
Washington	2,453	24,148,000	51,781	174,858,452	13.81
Total	12,337	135,546,000	192,592	695,574,763	19.49
California	12,008	157,495,000	248,722	967,099,004	16.29
Total	24,345	293,041,000	441,314	1,662,673,767	17.62
All other States			2,784,610	11,942,322,361	
Total	24,345	293,041,000	3,225,934	13,604,996.128	2.15

EXHIBIT B

The following is taken from Statistics of Income for the year 1921, table 1, page 38:

State	Net income	Normal tax	Surtax	Total tax	Percent of total
Arizona	$48,310,197	$419,839	$96,798	$516,637	0.07
Idaho	49,737,718	406,714	86,944	493,658	.07
Louisiana	197,897,146	3,203,864	2,100,658	5,304,522	.74
Nevada	22,455,508	231,915	97,381	329,296	.05
New Mexico	27,838,165	255,637	95,992	351,629	.05
Texas	536,897,427	7,835,456	4,832,438	12,667,894	1.76
Washington	262,109,642	3,299,094	1,610,763	4,909,857	.68
Total	1,145,245,803	15,652,519	8,920,974	24,573,493	3.42
California	1,168,021,448	20,158,214	16,280,218	36,438,432	5.06
Total	2,313,267,251	35,810,733	25,201,192	61,011,925	8.48
Noncommunity States	17,263,945,277	272,248,689	386,126,492	658,375,181	91.52
Total	19,577,212,528	308,059,422	411,327,684	719,387,106	100.00

The following is taken from Statistics of Income, year 1921, page 5.

Classification of income, year 1921	Income	Percent of total
Total community income	$175,684,785	0.[illegible]
Total noncommunity income	19,401,527,743	99.[illegible]
Total income	19,577,212,528	10[illegible]

Exhibit C

The following is taken from Statistics of Income, for the year 1929, table 9, pages 80 to 151:

State	Net income	Normal tax and tax on capital gains, net	Surtax	Total tax	Percent of total
Arizona	$60, 788, 434	$614, 590	$499, 184	$1, 113, 774	0. 11
Idaho	38, 525, 958	115, 883	68, 442	184, 325	. 02
Louisiana	170, 713, 998	1, 331, 598	1, 527, 970	2, 859, 568	. 29
Nevada	21, 597, 783	133, 276	223, 168	356, 444	. 04
New Mexico	30, 875, 636	177, 908	121, 974	299, 882	. 03
Texas	592, 518, 704	6, 616, 780	6, 250, 170	12, 866, 950	1. 28
Washington	302, 258, 404	3, 414, 366	2, 360, 977	5, 775, 343	. 57
Total	1, 217, 278, 917	12, 404, 761	11, 051, 885	23, 456, 286	2. 34
California	1, 689, 896, 424	20, 131, 946	25, 228, 332	45, 360, 278	4. 53
Total	2, 907, 175, 341	32, 536, 707	36, 280, 217	68, 816, 564	6. 87
Noncommunity States	21, 893, 560, 223	387, 008, 763	546, 112, 460	933, 121, 583	93. 13
Total	24, 800, 735, 564	419, 545, 470	582, 392, 677	1, 001, 938, 147	100. 00

The following is taken from Statistics of Income, year 1929, page 6:

Classification of income, year 1929	Income	Percent of total
Total community income	$647, 799, 247	2. 61
Total noncommunity income	24, 152, 936, 317	97. 39
Total income	24, 800, 735, 564	100. 00

Exhibit D

The following is taken from Statistics of Income, year 1929, table 9, pages 75 to 124:

State	Net income	Normal tax and capital gains tax—net	Surtax	Total tax	Percent of total
Arizona	$28, 745, 823	$139, 706	$107, 574	$247, 280	0. 10
Idaho	18, 350, 071	40, 884	5, 161	46, 045	. 02
Louisiana	107, 673, 824	455, 064	436, 848	891, 912	. 36
Nevada	14, 041, 657	76, 935	272, 091	349, 026	. 14
New Mexico	18, 231, 469	57, 097	60, 239	117, 336	. 05
Texas	333, 673, 467	2, 541, 240	2, 093, 119	4, 634, 359	1. 88
Washington	174, 858, 452	576, 368	661, 676	1, 238, 044	. 50
Total	695, 574, 763	3, 887, 294	3, 636, 708	7, 524, 002	3. 05
California	967, 099, 004	5, 673, 016	9, 059, 264	14, 732, 280	5. 99
Total	1, 662, 673, 767	9, 560, 310	12, 695, 972	22, 256, 282	9. 04
Noncommunity States	11, 942, 322, 361	50, 488, 729	173, 382, 266	223, 870, 995	90. 96
Total	13, 604, 996, 128	60, 049, 039	186, 078, 238	246, 127, 277	100. 00

The following is taken from Statistics of Income, year 1931, page 6:

Classification of Income, year 1931	Income	Percent of total
Total community income	$293, 040, 437	2. 15
Total noncommunity income	13, 311, 955, 691	97. 85
Total income	13, 604, 996, 128	100. 00

STATEMENT OF HON. FRITZ G. LANHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Shallenberger. The committee will next hear from Mr. Lanham.

Mr. Lanham. Mr. Chairman and gentlemen of the committee, I realize that it is time for the House to meet and I realize also that you have heard this matter presented in detail by these various gentlemen, and I should like to say a word or two very briefly with reference to the fundamental principle involved in the proposed legislation, insofar as the State of Texas is concerned. It seems to me that the crux in the consideration of a matter of this kind must be the fundamental principle, and not the incidental item of whether one State pays more tax than another State. I desire to discuss this very briefly from the standpoint of Texas, because, naturally and necessarily, I am more familiar with the law of that State than of any other.

We of Texas feel that we should have a continuation of the present practice, not as a matter of special privilege, but as a matter of right, and that right inheres in the nature, and the essence, and the substance of our property laws, and we feel that this proposal is a frontal attack upon that right.

Now, very briefly and from the standpoint purely of the principle involved, what is the situation with reference to Mr. and Mrs. Texan? When they are married, their separate property at the time of marriage remains their separate property. The income from that separate property and the income from all their endeavors becomes thereafter community property. In the usual sense, maritally, Mr. and Mrs. Texan are one person, but with reference to their property relationships, they are decidedly and distinctly two persons, because each spouse has the right to one half of all the property accumulated after the marriage. Each spouse owns that one half. It is true that the husband has control of the community property because, necessarily, in the very nature of things, someone must have charge of the administration. But it is no more equitable to charge the taxes against the one spouse who has control of the property of another than it would be to charge any agent or any administrator with the taxes upon property administered by him. Now, not only is this property half and half owned by the respective spouses, but that relationship continues; after divorce, each gets half. If one should die, either according to our statutes of descent and distribution, or by testamentary disposition, neither can be dispossessed of that half. As a mere right of ownership each has one half of the property; it belongs to that spouse; it cannot be taken away from that spouse. If there is any fraudulent practice in control, the courts will give the relief to the spouse that is affected thereby. And so, for the purposes of taxation, the property belonging separately and distinctly in equal halves to the two spouses, each should make a separate return of the property belonging to him or her. It seems to me that this is so sound fundamentally and as a matter of right that it cannot be questioned, and I believe that that right, under our property laws, would be upheld in the courts.

Mr. Shallenberger. Do you know of cases where that thing, which you say is the crux of the situation and, as I view the matter,

is the basis of the bill, has been decided by the courts, even though the control is vested in the husband so that he has a very powerful control over the property, even to the point of being able to dispose of it?

Mr. LANHAM. He has not the disposition of all. There is some property in which the wife must join; for example, the homestead and other property.

Mr. SHALLENBERGER. Have there been cases going to the Supreme Court where the ownership of the property is such that the wife has a right to have it taxed separately?

Mr. LANHAM. I am not familiar with recent decisions, in view of the fact that I have not practiced law since I came to Congress. I would prefer to refer you to Mr. Fulbright. It seems to me that the courts would so decide, because it is not a fiction; it is a fact. One half of the property belongs to the husband and one half of the property belongs to the wife, and the husband and the wife cannot be divested of that half by divorce or in any other way.

Mr. SHALLENBERGER. The reason I asked that was that we have learned that the laws of the various States are different. Somebody from your State suggested that you have this right under your constitution. Therefore, it is a little different from the State of California, where it is not definitely in the constitution.

Mr. LANHAM. It is a fundamental right with us.

Mr. HILL. Is it not a fundamental right, recognized by the Federal Government, that a State has the exclusive power to fix the status of property rights between husband and wife, whether that be done by constitutional provision or by statute of the State legislature?

Mr. LANHAM. That is my understanding, and it would be no more fair under our law in Texas and under our practice in Texas, with the wife's half of the property safeguarded in so many ways, to make the husband pay the taxes due upon her property than it would be to make him pay the taxes due upon the property of some stranger, because it is not his property. His control is a matter of administration which, if not properly performed can be corrected in the courts. He cannot in any way divest her of that property; it is protected during the marriage state, in divorce, and after death. It seems to me to be purely fundamental, and that must be the deciding principle with reference to the taxing policy of the United States, not whether Texas pays more taxes than Arizona or New York, or some other State, but does each citizen, in accordance with the laws of the State in which he lives with reference to property holdings, pay what he should pay.

That is all I wish to say, but I hope you will bear in mind in your consideration of this measure that fundamental principle involved.

Mr. SHALLENBERGER. I will say that the gentleman has given us a very constructive analysis, and has presented the matter in a manner which we understand. We appreciate your statement very much. Is Mr. Buck here?

Mr. BUCK. I would prefer to give my statement at a later session.

Mr. SHALLENBERGER. We will adjourn until Friday morning at 10 o'clock.

Thereupon, at 12:20 p.m., an adjournment was taken until Friday, May 11, 1934, at 10 a.m.)

COMMUNITY PROPERTY INCOME

MONDAY, MAY 21, 1934

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE OF THE COMMITTEE ON WAYS AND MEANS.

The subcommittee met at 10 a.m., Hon. Ashton C. Shallenberger (chairman) presiding.

Mr. SHALLENBERGER. The subcommittee will please come to order.

Mr. HILL. I would like to offer for the record a memorandum brief by George Donworth and Charles T. Donworth, Seattle, Wash.

Mr. SHALLENBERGER. Without objection, it will be placed in the record.

(The memorandum is as follows:)

MEMORANDUM BRIEF IN BEHALF OF COMMUNITY TAXPAYERS OF THE STATE OF WASHINGTON IN OPPOSITION TO H.R. 8396 BY GEORGE DONWORTH AND CHARLES T. DONWORTH, SEATTLE, WASH.

The bill (H.R. 8396) now under consideration by the Subcommittee on Ways and Means of the House of Representatives, reads as follows:

[H.R. 8396]

A BILL Relating to the taxation of community property income

"*Be it enacted by the Senate and House of Representatives of the United States of America*, That for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse who has the management and control thereof under the law of the jurisdiction in which the marital community exists, and such spouse shall alone be entitled to the deductions and credits allowed under the internal revenue laws which are properly allocable to such property or income."

PURPOSE OF THIS BRIEF

This brief is reduced to a relatively small compass by reason of the fact that a full presentation of the position of the community taxpayers of the State of Washington was made before the subcommittee on May 4, 1934, by the writer of this brief, George Donworth, of Seattle, Wash. This oral statement has been printed as no. 4 of the committee print hearings. The scope, therefore, of this brief will be to supplement in a brief compass the oral statement, and to set forth with more definiteness the authorities referred to in the oral statement.

THE WASHINGTON STATUTES DEFINING AND REGULATING COMMUNITY PROPERTY

With the exception of property owned by the spouses before marriage and that acquired afterward by gift, bequest, devise, or inheritance, and the rents, issues, and profits thereof, all property acquired after marriage in any manner whatsoever by either husband or wife or both is community property (Rem. Comp. Stat., sec. 6890, 6891, and 6892).

By section 6892, the husband has the management and control of community personal property and the like power of disposition as he has of his separate personal property, except he shall not devise by will more than one half thereof. As we show below, notwithstanding the generality of this language, the husband's powers are very much restricted by the judicial decisions construing this section.

By section 6893, the husband has the management and control of the community real property, but is forbidden to sell, convey, or encumber it unless the wife join with him in executing and acknowledging the instrument of conveyance or encumbrance.

As to real estate, conveyances, and agreements for conveyances made by the husband alone are void, even as against the husband. *Holyoke* v. *Jackson* (3 Wash. Ter. 235), *Hill* v. *Young* (7 Wash. 33), *Mable* v. *Whittaker* (10 Wash. 656), *Warburton* v. *White* (176 U.S. 484), *Adams* v. *Black* (6 Wash. 528), *Kaufman* v. *Perkins* (114 Wash. 40).

A lease is an encumbrance under section 6893, and a lease or agreement for a lease, executed by the husband alone, is void even though the wife had knowledge of it. *Spreitzer* v. *Miller* (98 Wash. 601), *Kaufman* v. *Perkins* (114 Wash. 40), *Hoover* v. *Chambers* (3 Wash. Ter. 26).

In a suit by vendee to reform for mutual mistake a written contract for the conveyance of land, made by both a husband and wife, reformation is refused unless it be shown that the wife as well as the husband personally participated in the mistake. *Itkin* v. *Jeffery* (126 Wash. 47).

Referring to section 6892, giving the husband the management and control of community personal property, the language of this section is construed by judicial decisions to amount to no more than the giving of a power of attorney to the husband to act in behalf of his principals, the husband and wife, thus giving effect to the language of the statute which makes community property the common property of both spouses.

In *Schramm* v. *Steele* (97 Wash. 309), the Washington Court said that the husband's powers with relation to community personal property are no broader than those employed in general powers of attorney; that the husband is a mere statutory agent for the community; and that there is an absolute equality of ownership and rights in all community property, both real and personal, there being no distinction whatever so far as concerns the equal property interest between husband and wife.

To the same effect in the following cases: *Marston* v. *Rue* (92 Wash. 129); *Olive Co.* v. *Meek* (103 Wash. 467); *Snyder* v. *Stringer* (116 Wash. 131).

In *Marston* v. *Rue* (92 Wash. 129), the Court declares the husband to be only the head of the firm and that the personal property is as much the wife's as the husband's; and that her property right in it is as great as his.

In *Stewart* v. *Bank of Endicott* (82 Wash. 106), the court said that the purpose of giving the management and control of the community personal property to the husband is to facilitate the business of the community. In any suit brought by a third party against the husband, the wife has the right to assert the noncommunity character of the debt or obligation, and if she does so, this question must be litigated at the same time that all other conroverted questions in the case are litigated. *McDonough* v. *Craig* (10 Wash. 239); *Allen* v. *Chambers* (18 Wash. 341).

The wife may borrow money or otherwise incur obligations for the benefit of the community and thereby bind the community as effectually as the husband may do. *Fielding* v. *Ketler* (86 Wash. 194).

On the other hand, the husband equally with the wife is prohibited by Washington statutes from discharging out of community property an obligation which is not a community obligation, and the wife suing alone may enjoin collection of the husband's separate debt out of community property. *Spinning* v. *Allen* (10 Wash. 570), *Snyder* v. *Stringer* (116 Wash. 131), *Fidelity & Deposit Co.* v. *Clark* (144 Wash. 520).

As to the nature of the wife's interest in the community property, real and personal, the Washington decisions make it plain that the wife's interest is a legal interest just the same as the husband's interest is a legal interest. The Washington decisions deny that the husband holds the legal title, with a resultant equity, in the wife. The title of both spouses is a legal title, equal in both. *Mabie* v. *Whittaker* (10 Wash. 656).

On divorce the community is dissolved, and from that time on (unless the decree of the court for reasons growing out of the divorce grounds transfers property from one spouse to the other) the two spouses become tenants in common.

In *Ambrose* v. *Moore* (46 Wash. 463), the court said:

"From the necessities of the case, their joint or community property must become common property. After the divorce there is no community, and in the nature of things, there can be no community property. The divorce does not vest or divest title; the title does not remain in abeyance and it must vest in the former owners of the property as tenants in common."

In *Schneider* v. *Biberger* (76 Wash. 504), it is said:

"Such property as was community property prior to the decree and not disposed of thereby, would become common property in which husband and wife would retain all the interest vested in them prior to the decree."

The community property is not liable for the husband's torts, though committed after marriage, unless under the doctrine of respondent superior, they are committed in carrying on the business of the community. For instance, a husband who holds the office of sheriff, and in that capacity committed a tort, cannot subject the community property to liability therefor. *Fidelity & Deposit Co.* v. *Clark* (144 Wash. 5[illegible]), *Brotton* v. *Langert* (1 Wash. 73), *Bice* v. *Brown* (98 Wash. 416), *Kies* v. *Wilkinson* (114 Wash. 89), *Coles* v. *McNamara* (131 Wash. 691), *Schramm* v. *Steele* (97 Wash. 309), *Wilson* v. *Stone* (90 Wash 365), *Day* v. *Henry* (81 Wash. 61).

In case the husband during marriage incurs indebtedness by becoming an accommodation endorser or guarantor of indebtedness in which the community has no interest, his liability cannot be enforced against the community property. *Peterson* v. *Zimmerman* (142 Wash. 385).

In *Parker* v. *Parker* (121 Wash 24), the court said:

"The law which gives the husband the management and control of the community personal property does not give him the right to make substantial gifts thereof against the consent of his wife. As was said in *Schramm* v. *Steele* (97 Wash. 309, 166 Pac. 634): 'the statute * * * intends no more than to make him a stautory agent of the community.'

"Not having the consent of his wife—the record, in fact, disclosing that she would not consent thereto—the rule established in *Marston* v. *Rue* (92 Wash. 129, 159 Pac. 111), is applicable and the gift must be held to have been void."

See also: *Stewart* v. *Bank of Endicott* (82 Wash. 106).

The community property is not liable for the separate obligations of either husband or wife, but only for obligations which can be strictly classified as "community debts". Debts contracted by the husband (or by the wife) before marriage cannot be enforced against community property. The same is true of an obligation contracted by the husband after marriage unless the same constitute a community debt by reason of having been contracted in behalf of the community business under the husband's limited authority of management and control. Community personal property falls within this rule equally with community real estate, and cannot be used or resorted to for the purpose of paying the husband's separate debt. *Olive Co.* v. *Meek* (103 Wash. 467); *Peterson* v. *Zimmerman* (142 Wash. 385); *Spokane State Bank* v. *Tilton*, (132 Wash. 641); *Snyder* v. *Stringer*, (116 Wash. 131); *Huyvaerts* v. *Roedtz* (105 Wash. 657).

In order that community property in Washington may be taken for a debt contracted by either husband or wife, the debt must be shown to be a debt contracted in behalf of the community, and both husband and wife are individually entitled to their day in court on the determination of this question. A judgment against the husband alone does not settle the point. The wife "has at least as much right to contest the facts" as the husband has. *Littell Mfg. Co.* v. *Miller* (3 Wash. 480).

The latest decision of the Supreme Court of Washington on this subject is found in *Bortle* v. *Osborne*, 155 Wash. 585. In that case, the court expressly declares that the community is not a distinct entity or juristic person, and that all community property is owned by both spouses equally. The court laid down the following propositions:

"(1) We have not receded from the rule, which we now reiterate, that the liability for the husband's tort which is committed in the management or prosecution of the community business can be enforced against the community property."

"(2) By the community-property law of this State (Rem. Comp. Stat., sec. 6890–6906), the legislature did not create an entity or a juristic person separate and apart from the spouses composing the marital community. The legislature did nothing more than classify as community property—designate the

character of certain property as community and other property as separate—the property acquired after marriage by the spouses. We have, for convenience of expression, employed the terms 'entity' and 'legal entity' in referring to a partnership and to a marital community. However, we have never held that a partnership or a marital community is a legal person separate and apart from the members composing the partnership or community, or that either the partnership or the marital community has the status of a corporation.

"A marital community is in no sense a corporation; neither is it a partnership, though the community of property between the spouses is, in a restricted sense, a partnership between the husband and wife. The legislature, in defining community property (sec. 6890–6906, Rem. Comp. Stat), did not change the relationship of husband and wife to the status of a corporation or declare that the property acquired during marriage was owned by a legal personality distinct from the spouses composing the community. In the community property each of the spouses has an undivided one-half interest."

That the husband's separate indebtedness, whether in contract or tort, cannot be enforced against the community property, either real or personal, is made plain in the following cases: *Snyder* v. *Stringer* (116 Wash. 131), *Peterson* v. *Zimmerman* (142 Wash. 385), *Spokane State Bank* v. *Tilton* (132 Wash. 641), *Olive Co.* v. *Meek* (103 Wash. 467), *Huyvaerts* v. *Roedtz* (105 Wash. 657).

THE WASHINGTON LAWS CONCERNING DESCENT OF COMMUNITY PROPERTY AND THE DISPOSITION THEREOF BY WILL

Section 1342 of Remington's Washington Statutes provides that upon the death of either husband or wife one half of the community property goes to the survivor and the other half is subject to the testamentary disposition of the deceased husband or wife.

"In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies."

This statute has regulated the descent and testamentary disposition of community property in Washington for more than 50 years. The language of this section is also recognized by the courts as showing the actual ownership by the husband and by the wife of their one-half interest in all the community property, real and personal. *Ahern* v. *Ahern* (31 Wash. 334), *Snyder* v. *Stringer* (116 Wash. 131), *Scott* v. *Stanley* (149 Wash. 29), *Hill* v. *Young* (7 Wash. 33), *Mabie* v. *Whittaker* (10 Wash. 656), *Stewart* v. *Bank of Endicott* (82 Wash. 106), *Parker* v. *Parker* (121 Wash 24), *Buchser* v. *Buchser* (231 U.S. 157).

In *Scott* v. *Stanley* (149 Wash. 29), it is held that, on the death of the wife intestate, her one half of the community property vests immediately in her heirs without probate.

Consequently, the husband can do nothing to prevent the wife's willing away her one half of the community property to strangers or, in the absence of a will, to prevent descent, on her death, of her half of the community property to her children by the same or by a former marriage.

Suppose that, during the marriage, the husband as agent of the community builds up a substantial business, of great value as a going concern because of its earning power. Upon the wife's death, her legatees or devisees, though strangers, or, in the absence of a will, her children, can immediately insist on a liquidation or sale of the business and all other community assets in order to reduce to cash the wife's one half of the community business and community property which passes to her legatees, devisees, or children.

Suppose, on the other hand, under the circumstances last described, the husband dies and the wife survives. The business and assets must be liquidated just the same as in the other case. The wife will continue to own one half of all the property, and the husband's children or his legatees or devisees will take the one half interest which belonged to the husband. There is equality of interest and equality of treatment in both cases. These statutory provisions are utterly inconsistent with the claim that the wife's interest in community property is not actual, real, and vested.

An estate or inheritance tax is paid to the United States on the death of either husband or wife, this estate tax being based upon the value of the half interest of the decedent spouse. The propriety of this practice is recognized by the general counsel of Internal Revenue and by the Department generally. See general counsel's memorandum no. 7773 (August 1930).

THE COMMUNITY PROPERTY IN WASHINGTON CONSISTS OF (A) THE EARNINGS OF THE HUSBAND, (B) THE EARNINGS OF THE WIFE, (C) RECOVERIES FOR PERSONAL INJURIES SUFFERED BY EITHER HUSBAND OR WIFE, AND (D) THE ACCUMULATIONS OF HUSBAND AND WIFE AFTER MARRIAGE WITH THE RENTS, ISSUES, AND PROFITS THEREOF

It would be manifestly unfair to follow the State law only to the point of combining these sources of income into a joint income and then taxing the entire fund to the husband alone.

The earnings of the wife are community property equally with the earnings of the husband. It is only when the wife is living separate and apart from the husband that her earnings become her separate property.

Abbott v. *Wetherby* (6 Wash. 507, 512), *Marsh* v. *Fisher* (69 Wash. 570).

Throughout the Washington decisions there occur cases where the community property is found to be the result of the earnings of the work or labor of the wife. Both the statute and the decisions treat the work and services of the wife as having the same effect as the work and services of the husband, namely, to produce community property.

In *Jones* v. *Duke* (151 Wash. 108) it was held that a wife's bank account, accumulated by her savings from allowances for running a house and from money received from a roomer and boarder, is community property.

In *Wamsley* v. *Rostad* (150 Wash. 192, 196) it was held that where an unmarried woman had a contract for compensation for caring for an invalid mother the woman's marriage converted the subsequent earnings under that arrangement into community property. The Court said:

"From the date of the marriage, the earnings of the deceased (she at all times up to her death having lived with her husband) belonged to the community, and earnings subsequent to the marriage could not be diverted from the community by the prior contract."

It is, of course, the common practice for married women to earn money as clerks, assistants in various occupations, musicians, teachers and what-not. They are frequently engaged in mercantile and professional occupations, either singly or in combination with their husbands. All earnings and profits so made by a married woman become community property in Washington. It is absurd to say that the community property law of the State is to be followed up to the point of converting these earnings of the wife into community property, and then refusing to give to the State community property statutes their further effect, by not recognizing the joint and common interests of both spouses in the product.

The same principle applies as to recoveries for personal injuries suffered by either husband or wife. Whatever personal injury the wife undergoes, the compensation therefor is community property.

Hynes v. *Colman Dock Co.* (108 Wash. 642), *Wamper* v. *Beinert* (125 Wash. 494).

The community property law of Washington does not require any showing as to whether the community property arises from one or all of the four sources set forth in the foregoing proposition. The wife's interest in all of the community property arises positively from the State law which makes all thereof the common property of the husband and the wife and protects equally the interest of both spouses therein.

THE STATUTES AND DECISIONS IN THE STATE OF WASHINGTON AFFORD THE WIFE AMPLE REMEDIES FOR ANY INTERFERENCE WITH HER COMMUNITY RIGHTS

Given the status of community property, the foregoing proposition naturally follows: *Marston* v. *Rue* (92 Wash. 129); *Schramm* v. *Steele* (97 Wash. 309); *Kimble* v. *Kimble* (17 Wash. 75).

(An action brought by the wife against the husband, wherein the court set aside a deed executed by the husband, conveying property to his mistress.)

Fields v. *Fields* (2 Wash. 441).

(In which a conveyance by the husband to his brother, made without consideration, was set aside.)

Spinning v. *Allen* (10 Wash. 570).

(In which the wife, suing alone, was given an injunction against the collection of a separate debt of the husband out of community property.)

In *Hynes* v. *Colman Dock Co.* (108 Wash. 642), a wife brought suit against a third party for personal injuries received by her, and made the husband a party defendant. Recovery to the wife was refused on the sole ground that

the complaint did not allege "abandonment or dissipation, or waste of the community personalty, nor of the husband's failure to exercise honest judgment in refusing to institute action." This decision applies the same principle as that announced in *Marston* v. *Rue* (92 Wash. 129), and, in fact holds, by necessary implication, that the wife alone may maintain an action even as to the community personal property, where she alleges that there has been an abandonment of the cause of action by the husband, or dissipation or waste thereof, or that the husband has failed to exercise honest judgment in the exercise of his statutory powers.

In *Mattinson* v. *Mattinson* (128 Wash. 328) a suit by the wife alone against the husband alone was sustained and the wife's claims against the community property upheld.

In *Normile* v. *Denison* (109 Wash. 205) the court, at the suit of the wife, set aside conveyances and transactions whereby the husband had attempted to defraud his wife of community property.

In *Wampler* v. *Beinert* (125 Wash. 494) the court protected the wife's interest in community personal property where the husband had neglected or refused to act in asserting a claim for personal injuries to the wife and attempted to settle and release the claim therefor. The court held that the purpose of the statute, giving the husband management and control of the community personal property, is only for the purpose of facilitating the business of the community and that he cannot use that power to thwart the law. The court also held that the doctrine of respondeat superior cannot be applied to acts of the husband when such acts are without the scope of his authority, and the court speaks of the wife's "inherent power" to act when necessary to protect her interest in community property. Further, in this case (*Wampler* v. *Beinert*, 125 Wash. 494) the court adopts the Texas rule as established in *Dority* v. *Dority* (96 Texas 215) and other Texas cases, that the wife can protect, and enforce in the courts by suit against the husband, her property rights in community property, and the Washington court quotes from *Dority* v. *Dority* as follows:

"* * * his right of management is dependent upon the discharge of the duties which go hand in hand with that right, * * * if the husband has repudiated the duties, and is asserting only the rights and powers of his position for selfish purposes, the wife has rights of property which she can enforce in the courts * * *."

In the same case (*Wampler* v. *Beinert*, 125 Wash. 494) the Washington court also approves and follows the holdings of the Idaho court along similar lines, quoting with approval the following from *Hall* v. *Johns* (17 Idaho 224):

"* * * the interest of the wife is so vested in her that the husband cannot deprive her of it by voluntary alienation for the mere purpose of divesting her of her claim to it."

No case can be found in the State of Washington where the wife has been refused protection as to community property, either real or personal, where the husband has been guilty of dissipation or waste, or fraud, or has failed to exercise honest judgment in the exercise of his statutory power of attorney, or where, for any reason, the wife's interest needs protection.

THE VESTED AND EQUAL INTEREST OF THE WIFE IN COMMUNITY PROPERTY IN WASHINGTON IS RECOGNIZED NOT ONLY BY THE STATE DECISIONS BUT ALSO BY THE FEDERAL DECISIONS AND RULINGS

The decision of the Supreme Court of the United States in *Warburton* v. *White* (176 U.S. 484) cites and quotes from several of the Washington decisions which we have cited above in this brief, approves those decisions and asserts the wife's positive interest in the community property in Washington. Quoting from the case of *Mabie* v. *Whittaker* (10 Wash. 656), the United States Supreme Court recognizes that the wife's right is as much vested in community property as is the husband's (p. 493). At page 494, the United States Supreme Court said:

"Now it cannot in reason be denied that the decisions from which we have just quoted held that the purpose of the Legislature of Washington, whether Territorial or State, in the creation of community property, was to adopt the features essentially inhering in what is denominated the community system—that is, that property acquired during marriage, with community funds, became an acquet of the community and not the sole property of the one in whose name the property was brought, although, by the law existing at the time, the husband was given the management, control, and power of sale of

such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community."

Further, at page 497, the United States Supreme Court said:

"It is a misconception of that system to suppose that, because power was vested in the husband to dispose of the community acquet during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property."

In *Arnett* v. *Reade* (220 U.S. 311), a case involving the nature of the title to community property in New Mexico, this court cites and follows *Warburton* v. *White*. The opinion of the United States Supreme Court declares—

"It is conceded by the court below and everywhere, we believe, that in one way or another she (the wife) has a remedy for an alienation made in fraud of her by her husband."

and the Court expresses the view that the legislature could not put an end to the wife's interest "without compensation consistently with the Constitution of the United States."

THE OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES RECOGNIZE THE RULE THAT OWNERSHIP IS THE TEST OF INCOME TAX LIABILITY AND THAT THIS OWNERSHIP MUST BE DETERMINED BY THE LOCAL LAWS OF THE STATES. THE FEDERAL COURTS' HOLDINGS ARE THE SAME

Attorney General Palmer on February 26, 1921 (32 Op. Attys. Gen. 435) referring to the State of Washington, quotes the pertinent statutory provisions and concludes:

"It appears to be the settled law of that State that the wife has, during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein. Leading cases are *Holyoke* v. *Jackson* (3 Wash. Ter. 235); *Mabie* v. *Whittaker* (10 Wash. 656, 39 Pac. 172); *Marston* v. *Rue* (92 Wash. 129, 159 Pac. 111); *Schramm* v. *Steele* (97 Wash. 309, 166 Pac. 634); *Huyvaerts* v. *Roedtz* (105 Wash. 657, 178 Pac. 801)"

Similar statements are made by the Attorney General with respect to the community-property laws of the other seven States except California, concerning which he says the statutes and decisions of that State require a different holding, (as the California law stood prior to 1927). He says:

"Summarizing, it appears that in all of the community property States, except California, their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one half of the community property. Her rights in the property of the community are perhaps most fully recognized in the State of Washington, where both spouses have testamentary disposition over one half of the community property, and where in the absence of such disposition it descends to their issue, or, in the absence of issue, to the survivor; while the husband is manager of the community estate in Washington, he may not sell, convey, or encumber real estate unless the wife join with him in the conveyance; and as was held in *Huyvaerts* v. *Roedtz*, *ante*, and *Schramm* v. *Steele*, *ante*, the separate debt of the husband cannot be satisfied out of community property where it is not incurred in connection with community business, nor for the benefit of the community."

The same principle has been declared by the Court of Appeals of the District of Columbia in a case involving community property.

Bek v. *Miller* (8 Fed. (2d) 797).

In ruling on the precise point involved in the present bill, namely, the right of the husband and wife in the State of Washington to make separate returns and to pay the income tax accordingly, the Circuit Court of Appeals for the Ninth Circuit, in *Rucker* v. *Blair* (32 Fed. (2) 222), speaking of the community-property system of Washington, said:

"The wife has during coverture, as well as upon dissolution of the marriage, a vested and definite interest and title in community property equal in all respects to the interest and title of her husband therein. *Marston* v. *Rue* (92 Wash. 129, 159 p. 111); *Schramm* v. *Steele* (97 Wash. 309, 166 p. 634); *Huyvaerts* v. *Roedtz* (105 Wash. 657, 178 p. 801). (See also Op. Atty. Gen., March 3, 1921, TD 3138, 4 CB 238).

The decisions of the United States District and Circuit Court of Appeals, regarding this same question as to taxation of community incomes in Texas,

Louisiana, and Arizona, are to the same effect. *Bacon* v. *Hopkins* (27 Fed. (2) 140); *Hopkins* v. *Bacon* (38 Fed. (2) 651); *Bender* v. *Pfaff* (38 Fed (2) 649); *Koch* v. *Goodell* (Dist. Ct., Ariz., Mar. 1929; not reported).

The general counsel of Internal Revenue (Mem. No. 6351) says:

"It is settled that the Federal courts follow the State courts where they have spoken in regard to the property rights of their citizens (citing cases). In this manner, the Federal courts apply the State law in determining the owner of the funds regarded as income, and so ascertain the person to whom the income is to be taxed."

IT IS A FUNDAMENTAL HOLDING OF THE UNITED STATES SUPREME COURT THAT, AS A MATTER OF SETTLED POLICY, IT WILL FOLLOW THE STATE DECISIONS INTERPRETING STATE LAWS GOVERNING PROPERTY AND PROPERTY RIGHTS, ALSO THAT THE WHOLE SUBJECT OF DOMESTIC RELATIONS OF HUSBAND AND WIFE BELONGS TO THE LAWS OF THE STATE AND NOT TO THE LAWS OF THE UNITED STATES

In *Warburton* v. *White* (176 U.S. 484, 496), this rule is enunciated in the following language:

"Where the State decisions have interpreted State laws governing real property or controlling relations which are essentially of a domestic and State nature, in other words, where the State decisions establish a rule of property, this court when called upon to interpret the State law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the State court of last resort to the statutes of the State, and thus conform to the rule of property within the State."

To the same effect are the following cases: *DeVaughn* v. *Hutchinson* (165 U.S. 566); *United States* v. *Crosby* (7 Cranch. 115); *Middleton* v. *McGrew* (23 Howard 45); *Lippincott* v. *Mitchell* (94 U.S. 767); *Washington* v. *Miller* (235 U.S. 422); *Buchser* v. *Buchser* (231 U.S. 157); *Elmendorf* v. *Taylor* (10 Wheat. 152, 159); *Hines Yellow Pines Trustees* v. *Martin* (268 U.S. 458. 464); *Knights* v. *Meyer* (265 U.S. 30); *Bucher* v. *Cheshire R.R. Co.* (125 U.S. 555); *Burgess* v. *Seligman* (107 U.S. 20, 27).

In *Ohio* v. *Agler* (280 U.S. 379), this court said:

"It has been understood that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States. and not to the laws of the United States.' (Re *Burrus*, 136 U.S. 586. 593, 594.)"

In the opinion of the Attorney General, rendered February 26, 1921 (32 Op. Attys. Gen. 435), the Attorney General said:

"In *Warburton* v. *White* (176 U.S. 484, 496) the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature the United States Supreme Court will follow the State decisions if possible to do so, in the discharge of its duties. Also in *DeVaughn* v. *Hutchinson* (156 U.S. 566, 570) it was held that to the law of the State in which property is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. In *United States* v. *Crosby* (7 Cranch. 155) it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where the same is situated."

THERE IS NO COMMON LAW OF THE UNITED STATES. THERE IS NO SUCH THING AS A NATIONAL SYSTEM OF THE LAW OF HUSBAND AND WIFE OR OF THE PROPERTY RIGHTS OF HUSBAND AND WIFE. THE LAWS OF EACH STATE MUST BE LOOKED TO TO DETERMINE ANY QUESTION OF THAT CHARACTER

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Smith* v. *Alabama* (124 U.S. 465). In that case, this court said:

"It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all

those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication."

THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ARE UNIFORMLY TO THE EFFECT THAT THE INCOME TAX IS A DIRECT TAX WHICH MUST BE BASED ON OWNERSHIP AND THAT OWNERSHIP MUST BE DETERMINED BY THE LAWS OF EACH STATE WHERE THE PROPERTY IS OWNED

Pollock v. *Farmers Loan & Trust Company* (158 U.S. 601) holds in the clearest terms that the Federal income tax assessed in any case upon the rents, issues, and profits of accumulated real estate and personal property is a direct tax on all of that property. It follows, therefore, that any such tax, to be valid, would have to be apportioned among the States unless the tax falls within the provisions of the sixteenth amendment. That amendment, however, it has been distinctly held by the same court, does not enable Congress to define incomes and does not change the direct character of an income tax as fixed by the *Pollock case*, which direct tax must be based on ownership.

As stated, we must look entirely to State law to ascertain who is the owner of the real and personal property whose income is taxed.

Questions of control, management, and the like, are without significance in this connection. Ownership is the only test.

In *Eisner* v. *Macomber* (252 U.S. 189; the second stock dividend case), the opinion of the court, referring to the first stock dividend case (*Towne* v. *Eisner*, 245 U.S. 418) said:

"The court treated the construction of the act (of Oct. 3, 1913) as inseparable from the interpretation of the sixteenth amendment; and having referred to income-tax cases (*Pollock* v. *Farmers Loan & Trust Co.*, 158 U.S. 601, 39 L.ed. 1108), and quoted the amendment, proceeded very properly to say (p. 704): 'It is manifest that the stock dividend in question cannot be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income.'"

Later in the opinion in *Eisner* v. *Macomber* (252 U.S., p. 205), the court says:

"The sixteenth amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted. In income tax cases (*Pollock* v. *Farmers Loan & T. Co.*, 158 U.S. 601), under the act of August 27, 1894, it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the States according to population, as required by article 1, section 2, clause 3, and section 9, clause 4, of the original Constitution.

"Afterward, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the sixteenth amendment was adopted, in words lucidly expressing the object to be accomplished; 'The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States and without regard to any census or enumeration.' As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income. *Brushaber* v. *Union P. R. Co.* (240 U.S. 1, 17, 19, 60, L.ed. 493, 501, 502); *Stanton* v. *Baltic Min. Co.* (240 U.S. 103, 112 *et seq.* 60 L.ed. 546, 553); *William E. Peck & Co.* v. *Lowe*, 247 U.S. 165, 172, 173, 62 L.ed. 1049–1051).

"A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts."

Later, in the same case (*Eisner* v. *Macomber* (252 U.S. 189 et seq.)) the court defined income as follows:

"'Income may be defined as the gain derived from capital, from labor, or from both combined', provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle case* (*Doyle* v. *Mitchell Bros. Co.* (247 U.S. 179, 185)."

The court also said:

"Here we have the essential matter: * * * a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being '*derived*', that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal; *that* is income derived from property. Nothing else answers the description."

(The italics in the last-quoted paragraph are largely those of the court.)

The dissenting opinion in *Eisner* v. *Macomber* puts in clear relief the substantial holding of the court, the dissenting opinion taking the ground that the word "incomes" in the sixteenth amendment was used, not in the sense announced in the opinion of the court, but in a broader sense conforming to a supposed common understanding among the public. Nevertheless the above-quoted declaration as to the meaning and effect of the sixteenth amendment has been expressly reaffirmed by this court and is the established law.

In *Taft* v. *Bowers* (278 U.S. 470), this court upheld the validity of sections 202 and 213 of the Revenue Act of 1921, which require the donee of a gift to pay an income tax on the capital gain, based on the cost of the gift to the donor. In the unanimous opinion of the court, it is said:

"Under the former decisions here the settled doctrine is that the sixteenth amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income."

These decisions, we submit, establish beyond question that, so far as concerns the income of accumulated real or personal property, the effect of the sixteenth amendment is merely to permit the direct tax, imposed on the income of that property, to be levied without apportionment. The tax is still a direct tax on the property itself, real or personal. Further, the tax is imposed because of ownership, as this court has emphatically declared. It is not a question of management or control, but solely of ownership. That ownership must be determined by State law.

In ruling upon an analogous question of State taxation, this court said, in *Home Savings Bank* v. *Des Moines* (205 U.S. 503):

"Taxes are assessed against persons upon the property which they own, not upon property which others own. We should be reluctant to suppose that there has been any departure from this principle in this law."

The line separating Federal jurisdiction from State jurisdiction in this connection is very clear. There is no twilight zone. In determining ownership, the origin of titles to property, the transfer of titles, and the effect of the marriage relation on the property rights of the spouses, are all subjects of legislation purely within the sovereign powers of the States. Congress has no more to do with those subjects than if the Federal Union had not been formed.

On the other hand, the levying of Federal taxes is within the power of the Federal Government, subject to such limitations only as the Federal Constitution prescribes. One of the limitations here is that an income tax on rents, issues, and profits of real or personal property is a direct tax on that property and such tax falls upon the owner under the established construction of the sixteenth amendment.

The sixteenth amendment, and the Federal statutes passed pursuant thereto, must be applied separately to the rules of property in each State. There is no attempt, either in the sixteenth amendment or in the laws enacted under it, to arrogate to the Federal Government any of the States' fundamental powers. The sixteenth amendment was adopted in view of the diversity of the property systems in the several States, and the amendment takes those different property systems as it finds them. The same must be true of the Revenue Acts of Congress enacted under that amendment.

The sixteenth amendment is to be read, as applied to the laws of each State, precisely as if the laws of that State prevailed in every one of the 48 States. The law of one State can have no effect in applying the sixteenth amendment or the revenue acts in any other State. This individual soverignty of the several States, preserving locally the absolute right to legislate on all questions of property, is one of the most important points in our Federal system.

The Federal system cannot survive unless the right of the States in this regard are respected and upheld. The foregoing decisions of the United States Supreme Court establish the principle that both the sixteenth amendment and any Federal revenue acts enacted under it are to be construed, as applied to ownerships in the State of Washington, precisely as if the community-property system prevailing in the State of Washington prevailed in every one of the 48 States in identical terms. There is no other principle upon which the line of demarcation between the Federal and State powers can be upheld.

The language of the Supreme Court of the United States in *Knowlton* v. *Moore* (178 U.S. 41, 89) is applicable in this connection:

"Giving to the term uniformity as applied to duties, imposts, and excises, a geographical significance likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts and excises upon a particular subject in one State and a different duty, impost or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes."

Discussing the same point the Court (p. 84) states a contention of counsel respecting this matter, which the Court later in its opinion upholds as follows:

"The words 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals, but simply require that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say that wherever a subject is taxed anywhere the same must be taxed everywhere throughout the United States and at the same rate." In *Florida* v. *Mellon* (273 U.S. 12) the United States Supreme Court said:

"The contention that the Federal tax is not uniform because other States impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several States, nor control the diverse conditions to be found in the various States which necessarily work unlike results from the enforcement of the same tax. All that the constitution (art. 1, sec. 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

ALL OF THE FOREGOING PRINCIPLES HAVE BEEN REAFFIRMED BY THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF "POE V. SEABORN" (282 U.S. 101), AND THE PARALLEL CASES FROM OTHER STATES DECIDED BY THE SAME COURT AT THE SAME TIME. THESE CASES ARE CONCLUSIVE TO THE EFFECT THAT THE PRESENT METHOD OF TAXING COMMUNITY INCOMES IN COMMUNITY PROPERTY STATES IS THE METHOD PRESCRIBED BY THE FEDERAL CONSTITUTION

Poe v. *Seaborn* is the leading case. It sets at rest all questions which the proposed bill seeks to raise.

In *Poe* v. *Seaborn*, after holding that "it is clear that the wife has, in Washington, a vested property right in the community property, equal with that of her husband, and in the income of the community, including salaries or wages of either husband or wife or both, "the court set forth the contention of the Commissioner of Internal Revenue, and said:

"The Commissioner contends, however, that we are here concerned not with mere names, nor even with mere technical legal titles; that calling the wife's interest vested is nothing to the purpose, because the husband has such broad powers of control and alienation, that while the community lasts, he is essentially the owner of the whole community property, and ought so to be considered for the purposes of sections 210 and 211. He points out that as to personal property the husband may convey it, may make contracts affecting it, may do anything with it short of committing a fraud on his wife's rights. And though the wife must join in any sale of real estate, he asserts that the same is true, by virtue of statutes, in most States which do not have the community system. He asserts that control without accountability is indistinguishable from ownership, and that since the husband has this quoad-community property and income, the income is that 'of' the husband under sections 210, 211, of the income-tax law."

(Let us note that the pending bill is based on the same contention, but the court said:)

"We think in view of the law of Washington above stated this contention is unsound. The community must act through an agent. This Court has said with respect to the community property system (*Warburton* v. *White*, 176 U.S. 494) that 'property acquired during marriage with community funds became an acquest of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control, and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community.'"

The Court added:

"We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife." This flatly denies the basic underlying theory and postulate of the pending bill.

In finally deciding the case (*Poe* v. *Seaborn*) in favor of the validity of the existing practice of divided returns of husband and wife in community property States, the Court said:

"Finally the argument is pressed upon us that the Commissioner's ruling will work uniformity of incidence and operation of the tax in the various States, while the view urged by the taxpayer will make the tax fall unevenly upon married people. This argument cuts both ways. When it is remembered that a wife's earnings are a part of the community property equally with her husband's, it may well seem to those who live in States where a wife's earnings are her own, that it would not tend to promote uniformity to tax the husband on her earnings as part of his income.

"The answer to such argument, however, is that the constitutional requirement of uniformity is not intrinsic, but geographic. *Billings* v. *United States* (232 U.S. 261, 58 L.Ed. 596, 34 S.Ct. 421), *Head Money cases* (*Edye* v. *Robertson*) (112 U.S. 580, 28 L.Ed. 798, 5 S.Ct. 247), *Knowlton* v. *Moore* (178 U.S. 41, 44 L.Ed. 969, 20 S.Ct. 747). And differences of State law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the revenue act to spell out a lack of uniformity. *Florida* v. *Mellon* (273 U.S. 12, 71 L.Ed. 511, 47 S.Ct. 265).

"The district court was right in holding that the husband and wife were entitled to file separate returns, each treating one half of the community income as his or her respective incomes, and its judgment is affirmed."

It will thus be seen that the reasons advanced at this present hearing in support of the proposed bill (H.R. 8396) have been met and answered by binding decisions of the Supreme Court of the United States. That court has authoritatively held (1) that the wife's half interest in community property and community income, including salaries, is exactly equal to that of the husband; (2) that the management and control conferred upon the husband by the several community-property statutes is a mere naked power and not a property right, and therefore an immaterial circumstance with respect to the Federal income tax; (3) that the present long continued practice of divided returns of community incomes by husbands and wives does not produce a lack of uniformity, but rather produces uniformity of income-tax procedure throughout the United States.

The later decision of the Supreme Court of the United States in the California case of *U.S.* v. *Malcolm* (282 U.S. 792) applies the rule of *Poe* v. *Seaborn* to California so far as concerns community property arising in that State after the amendment of the California statute made in 1927. This later reaffirmance of the rule of *Poe* v. *Seaborn* gives that rule added significance and authority.

THE CASES CITED BY PROPONENTS OF THE PENDING BILL FROM THE SUPREME COURT OF THE UNITED STATES DO NOT INDICATE THAT THAT COURT HAS DEPARTED IN ANY WAY FROM THE RULE OF OWNERSHIP AS THE TEST AND BASIS OF INCOME TAXES. ON THE CONTRARY THOSE CASES EMPHASIZE THE RULE AND MAKE IT MORE DEFINITE

Proponents cite *Burnett* v. *Leininger* (285 U.S. 126). In this case the taxpayer made a private agreement with his wife, attempting to make her an equal partner with him in the Eagle Laundry Co., a partnership. The court found that the wife never became a member of the partnership because the other members of the partnership never consented and were never asked to consent that the wife be admitted as a partner. The court said: "It does not appear that there was any attempt to change the ownership of the partnership assets." The court therefore concluded that the husband's agreement in favor of his wife did not amount "to more than an equitable assignment of one half of what her husband should receive from the partnership." If the wife had been made a member of the partnership, the case would never have reached the Supreme Court, because the Department would have applied its usual rulings and would have treated the partnership as an accepted fact, permitting division of the income between all the partners.

Proponents cite *Corliss* v. *Bowers* (281 U.S. 372). That case was cited in *Poe* v. *Seaborn*, and the Supreme Court held that it was not in point. The court said of the Corliss case that while the husband had technically parted with title, "yet he in fact retains ownership and all its incidents. But here the husband never has ownership. That is in the community at the moment of acquisition." As the Supreme Court has thus decided that the Corliss case has no application to the taxation of community incomes, we make no further comment.

Proponents cite *Reinecke* v. *Smith* (289 U.S. 172). That was another grantor case, a case where the grantor had full title and ownership of the property and made an incomplete divesture of that title and ownership. The court said that a "revocable trust amounts in its practical aspects to no more than an assignment of income. This court has repeatedly said that such an assignment, where the assignor continues to own the corpus, does not immunize him from taxation upon the income." The court proceeded to say that the case was distinguished from *Hoeper* v. *Tax Commission* (284 U.S. 206), "for there the attempt was to tax income arising from property always owned by one other than the taxpayer." The same attempt is made by the pending bill.

Proponents cite *Burnett* v. *Harmel* (287 U.S. 105). In that case the court merely held that in taxing capital gains the question of "what is a capital gain" is to be determined by the Federal statutes (in that case an oil lease). There was no question in the case of ownership, and the State law on the subject of ownership was followed without question.

Proponents cite *Burnett* v. *Wells* (289 U.S. 670), another grantor case. A grantor having absolute ownership of certain shares of stock assigned the stock to a trust company, with directions that a substantial portion of the income should be used to pay the premiums on policies of life insurance for $100,000 on the grantor's life, which policies the grantor had already taken out. The court said: "There was no attempt to charge against the taxpayer the whole income of the trusts. * * * The deficiency assessment was limited to that part of the income which kept the policies alive." The court found that that portion of the income held to be subject to the income tax) was intended by the grantor to be used and was used for his benefit, pursuant to his direction that the same should be devoted to paying premiums on policies in which he had an interest. This case is like all the other cases cited by proponents, namely, the case of taxation of an income to a grantor who had not completely divested himself of ownership and interest.

Proponents cite *Taft* v. *Bowers* (278 U.S. 470). The decision of the same case in the circuit court of appeals as *Bowers* v. *Taft*, (20 Fed. (2) 561). In this case the entire tax was assessed against the owner. The only question was as to the amount of the tax. The present owner had received shares of stock as a gift from a former owner. The question was whether the capital gain received by the owner (donee) from the sale of the gift should be limited to the enhancement arising after the date of the gift. The court said:

Under former decisions here the settled doctrine is that the sixteenth amendment confers no power upon Congress to define and tax as income, without apportionment, something which theretofore could not have been properly regarded as income.

The court goes on to say that because the statute which fixed the basis for computing the net capital gain had been enacted before the making of the gift, the present owner "accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold the stock she actually got the original sum invested plus the entire appreciation, and out of the latter only was she called on to pay the tax demanded." So it is clear that there was no attempt to impose an income tax on anyone but the owner, since the donee was the present owner and had received all of the proceeds of the sale.

Taking all of the cases cited by proponents, it is clear that in not one of them was any person held to be liable for Federal income tax unless he was the

owner or unless he had been the owner and had parted with an interest less than the entire interest, retaining a substantial interest in himself.

In additon to the clear distinctions as to all of those cases already pointed out, those cases are in substance distinguished by the Supreme Court itself in *Poe* v. *Seaborn*, where that Court distinguishes *Corliss* v. *Bowers* (281 U.S. 376). In *Poe* v. *Seaborn* (282 U.S. 101, at pp. 116, 117) the Court said, speaking of the Corliss case:

We held that where a donor retains the power at anytime to revest himself with the principal of the gift, Congress may declare that he still owns the income. While he has technically parted with title, yet he in fact retains ownership with all of its incidents. But here the husband never has ownership. That is in the community at the moment of acquisition.

The case of *Hoeper* v. *Tax Commission of Wisconsin* (284 U.S. 206), followed as it is by the case of *Heiner* v. *Donnan* (285 U.S. 312), establishes the proposition that the tax of a husband cannot be increased by reason of the fact that his wife receives an income owned by her. Those two cases, like so many others decided by the United States Supreme Court and cited herein, deny the power of Congress to do what this bill attempts to do.

Those cases have been thoroughly analyzed and discussed before the committee, and we will not prolong this brief by any further detailed consideration of them. The *Hoeper case* holds that the Constitution is violated as to the fourteenth amendment when the State attempts to tax a husband for property or income which under State law belongs to his wife. The *Heiner case* holds the course of action prohibited to the States by the fourteenth amendment is prohibited to the Federal Government by the fifth amendment.

Nor can proponents get any consolation from the opinion of the dissenting judges in the *Hoeper case*. That being the case of a Wisconsin State tax, the tax was imposed by the same legislative authority which had established the property relations of husbands and wives. The dissenters pointed out that since Wisconsin could, if it so desired, have gone back to the common law and could have vested the entire ownership of the wife's property in the husband, it followed that the Wisconsin statute there in question could be treated as a reenactment of the common-law relations of husband and wife, insofar as the State income tax was concerned. That is the only ground that the dissenters appear to have found for questioning the validity of the majority decision. Here no such considerations exist. The United States cannot change the relations of husbands and wives in any State. The United States cannot reenact the common law as to property rights between husbands and wives in any State. For all points involved in the pending bill, the *Hoeper case* stands as a complete barrier.

CONCLUSION

We respectfully submit that the report of the committee should embody the following conclusions:

1. The pending measure is unfair to the taxpayers of income taxes on community incomes in the community property States, and places them at a disadvantage as compared with citizens of other States.
2. The principles announced by the Supreme Court of the United States in numerous cases relating to income taxation, and particularly to the taxation of community incomes, are such that the unconstitutionality of the proposed measure is clear.
3. The passage of the proposed measure would not accomplish any useful or beneficial result.

Respectfully submitted.

GEORGE DONWORTH,
CHARLES T. DONWORTH,
Hoge Building, Seattle, Wash., Representing Community Income Taxpayers in the State of Washington.

Mr. SHALLENBERGER. Mrs. Isabella Greenway, the Congresswoman from Arizona, has a statement which she desires to have included in the record. She was unable to attend the session this morning, so I will submit this to the reporter. Without objection it will be incorporated in the record.

(The statement referred to is as follows:)

HOUSE OF REPRESENTATIVES,
Washington, D.C., May 8, 1934.

HON. A. C. SHALLENBERGER,
Chairman, Subcommittee of the Ways and Means Committee, House of Representatives, Washington, D.C.

MY DEAR MR. SHALLENBERGER: On behalf of the people of the State of Arizona, I wish to most strenuously oppose any favorable action upon H.R. 8396, which relates to personal-income-tax returns and is designed to impose an unjust tax upon people residing in the so-called "community-property States", of which Arizona is one.

This proposed law is unfair, unjust, inequitable, and would discriminate against citizens of the State of Arizona in that it would impose an income tax upon the husband or wife, whoever may have control and management of the community property, or property and income not owned or legally received by such taxpayer.

The theory of community property has been in effect in Arizona since that section of the country was under Spanish ownership and control. Under the laws of our State all property acquired during coverture except property received by gift or inheritance is community property and is owned share and share alike by each spouse. Marriage in the State of Arizona creates not only the customary status which is created in all states of the Union, but there is also immediately imposed a property partnership whereby each party to the marital contract becomes an absolute partner in all property acquired during the existence of the marriage state.

Upon the dissolution of the marriage state, each of the partners take their respective one-half interest in the accumulations of the partnership.

To require a spouse who has the management and control of the community property to pay a tax thereon as proposed by this bill would be assessing an income tax against such party for an income and property which she or he does not own. It would be the same as if a tax were imposed upon one of two parties in a voluntary copartnership, whereby one of the two partners would be called upon to pay the entire tax of the copartnership.

The further inconsistency and injustice of the proposed legislation is further evidenced by the fact that upon the decease of either spouse, one half of the community property immediately passes to his or her estate and the estate must pay an inheritance tax thereon. This bill proposes that the spouse having management or control of the community property will be required, in one instance, to pay upon the same as if it were his or her separate estate, and then for the purpose of the inheritance tax, the Government recognizes the community division and immediately imposes an inheritance tax upon the share of the decedent, even though such decedent did not own or manage the property during his or her lifetime.

The law is obviously unfair and unjust and imposes an unfair tax on the residents of community-property States, which States have burdens not imposed on the citizens not residing in community-property States.

Very sincerely,

ISABELLA GREENWAY.

Mr. SHALLENBERGER. The first Member of Congress to be called this morning is Hon. Frank H. Buck, from California. Mr. Buck, the committee will hear from you.

STATEMENT OF HON. FRANK H. BUCK, A MEMBER OF CONGRESS FROM CALIFORNIA

Mr. BUCK. Mr. Chairman and members of the committee: I do not intend to take up a great deal of your time by going into a discussion of the cases which I think have been ably handled by the professional gentlemen who appeared here last week, or whenever we had the last sessions.

I have taken the opportunity, as no doubt you have done during the recess since the last hearings, of reviewing the testimony, and I have come to the conclusion, insofar as the treatment of the cases is concerned, with the exception of a few which directly affect the California situation, which I shall discuss with you very briefly, they have been amply taken care of in the briefs which were submitted by Mr. Dunbar of Louisiana and in the testimony which was presented by Mr. Donworth of Washington.

I do not think there would be any profit to you, or that it would do any more than take up your time, for me to go over and review these cases again.

I believe I can say that it is the sense of the committee—and I know it is the sense of the Members of Congress—that we want to plug up all the loopholes that we can and cut out all the evasions of taxes that there are existing at the present time, and I think you have done that in your recent committee bill to a certain extent.

I do not believe it is the desire of any of you gentlemen—and certainly not the desire of the Congress as a whole—to force a citizen to pay a tax which is not morally or legally due under the laws of the United States.

Of course, you understand, gentlemen, that I appear here in opposition to the Treadway bill. I am sure that a review of the testimony of record will lead to the same conclusion, that is, that the proposed legislation is unconstitutional, unfair, and inequitable. Nevertheless, knowing the high character of the gentleman from Massachusetts who proposed this bill, I am convinced that it was proposed in the utmost good faith. As there was some discussion of the matter, which I have endeavored to follow carefully, being present at nearly all the sessions, I am convinced that probably I had better talk a little bit about the development of this community property system so that you can understand that it is not a case where the States in the west and southwest are trying in any way to manipulate their laws as the gentleman from Massachusetts said in his opening statement, with respect to the income tax laws of the United States.

I am a Californian of the third generation. I have gone through personally all the processes which are involved under the community property system, including the payment of income taxes. My father died intestate, leaving my mother surviving and I had to unscramble the question of the property involved, because my father inherited some of it from his father, my grandfather, and I know some of the

difficulties under which those who live in community property States labor.

Before following on with my remarks, for the benefit of those who may later read the record, and for the benefit of you gentlemen, I would like to touch on a few matters. As was called to your attention the other day, this matter was laid before the Ways and Means Committee in 1921, and in 1924. I think it would be well to read the illuminating debate occurring in the Sixty-first Congressional Record, pages 6872 and following——

Mr. HILL. What Record?

Mr. BUCK. Volume 61 of the Congressional Record, pages 6872 and following and pages 7229. That is with respect to the 1921 effort.

In 1924 the Ways and Means Committee of the House gave full hearings on this subject and refused to accept a similar amendment. I refer you to hearings before the Committee on Ways and Means in 1924, as follows: Pages 194, 348–375, inclusive, and pages 478 to 482.

The Senate committee on page 14 of its 1921 report on the revenue act——

Mr. HILL. Senate Finance Committee?

Mr. BUCK. The Senate Finance Committee on page 14 of its 1921 report on the revenue act spoke of the then pending amendment as "designed to restore uniformity of treatment." This phrase I think is perhaps the keynote of the campaign that the proponents of this bill are making.

I believe that it will not produce uniformity but that it will, instead, penalize the husband and wife in community property law States; that you would put yourself and the United States Government in the position of first recognizing the laws that create the marital community status and enforcing it, so far as it combines the earnings of the husband and wife and then arbitrarily making the combination income all the husband's.

When this matter was up before the Supreme Court in what is the leading case at the present time and under the present act, the case of *Poe* v. *Seaborn* (282 U.S. Reports), the Court said as follows:

> Finally the argument is pressed upon us——

Mr. HILL. Did you give the page reference?

Mr. BUCK. Thank you, Mr. Hill. It is page 117.

Mr. HILL. Of what report?

Mr. BUCK. 282 United States. I think that already appears in the record. (Reading.)

> Finally the argument is pressed upon us that the Commissioner's ruling will work uniformity of incidents and operation of the tax in the various States, while the view urged by the taxpayer will make the tax fall unevenly upon married people. This argument cuts both ways. When it is remembered that a wife's earnings are a part of the community property equally with her husband's, it may well seem to those who live in States where a wife's earnings are her own, that it would not tend to promote uniformity to tax the husband on her earnings as part of his income. The answer to such argument, however, is that the constitutional requirement of uniformity is not intrinsic, but geographic.

(Citing cases.)

> And the differences of State law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the revenue act to spell out a lack of uniformity.

It is easy for one who has been raised under the community property law to understand the idea that inhabitants of common law States have a different system. Unfortunately, it is not as easy for the gentlemen who have only had contact with common law States, who have been brought up under the common law to realize and grapple successfully with a body of substantive laws that is perhaps sui generis.

It is not the presence of a community of property between husband and wife that requires any explanation—its absence does. In the normal course of events a community of interest between the husband and wife should crystallize into a community of property holdings, and such we find, on investigation, has in fact been the course of events in the majority of the world populated and governed by the white race.

I will perhaps have to withdraw that word " majority " because since Russia has had a system of its own, it probably is not quite true.

The theory of community property comes down through the ages from certain portions of Germanic law. At the same time that the Saxons in the wilds of the German forests were developing one form of marriage law and marriage property relationships—and those Saxons came over and settled England—the Visigoths, the Swabians, and the Bavarians and others in the same forests of Germany were developing what is known today as the community property law.

The presence of it is to be found in Scandinavia and to be found in the south and southwest of Germany. When the Visigoths conquered Spain, they brought it to that country, and it remains law there today. Through the Spanish Conquest of the Americas, it was brought over here. It was brought into France and by the sixteenth century, or earlier than that, by the fifteenth century, it had developed in various portions of the country, notably the south and southwest areas, and in Paris where it was known as the Custom of Paris, which is the same as we know it in the southwest and the west today.

It came into Louisiana from France originally and was perpetuated through Spain. It came into Quebec through France. The charter of Crozat in 1712, creating the Territory of Illinois, provided that this community property law must be the law of the country.

It was the law of Missouri until 1807. It was not abrogated in Michigan until 1810. It was the law of Arkansas, and Iowa, and Utah until the people decided through their legislatures to change over to the common law.

There is not one single State in the southern tier of the United States that has not at some time had a community-property law in effect. Traces of it are found wherever the Spaniards and French exercised their influence on the colonization of the country.

The southwest and western portions of the United States remained under the influence of Spain, as you gentlemen know, for a much longer time than the north and northwestern portions under the influence of the French. So that that law came directly to us through our inheritance from Spain, through Mexico.

It has been suggested that this law was being taken advantage of in the light of the income-tax law. But, gentlemen, the Spanish law, the community-property law which we obtained from Spain, so far antedates any conception of an income-tax law that it is a most unfair and totally illogical statement to make.

Now I come to California. California was obtained through the Mexican cession. Article IX of the Treaty of Guadalupe-Hidalgo, signed February 2, 1848, guaranteed the Mexicans within the ceded territory free enjoyment of their property under the laws then existing.

Now, it is a principle of international law that the private law of the former sovereign remain unchanged by conquest or cession until set aside after that cession by new laws that are enacted.

The chairman of the subcommittee asked Representative Evans the other day something about whether we had a constitutional provision for the community-property law in the State of California. I submit, in all fairness, that it is immaterial whether a State has a constitutional provision authorizing a community-property law or not, as long as there is nothing in its constitution which sets up a different status of marital property relationships.

Obviously, the whole question of marriage, its status, and its property relationships have been left to the States. There is no claim that the United States Government has any control over that. As long as there is not a prohibition in a State Constitution against community property enactment, the legislature, in my opinion, is free to go ahead and make such laws and regulations as it sees fit.

But, Mr. Chairman, the people of California, in their constitution of 1849, article XI, section 14, not only did not set aside the community-property law but they used the following language:

> All property, both real and personal, of the wife, owned or claimed by her before marriage and that acquired afterward by gift, devise or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband.

Now, a reading of the discussion at the constituutional convention of 1849—and I give you a reference, " Debates in the convention of California on the formation of the State constitution ", in September and October 1849, published by J. Ross Brown, published in 1850, at pages 258 to 260, inclusive—will show that the founders were trying to protect the native Californians who were living and had lived there under the Spanish law, and that they premeditatively incorporated the law of community property into the constitution of 1849, because the debates show that there was a good deal of debate between the advocates of the common law and the civil law, and the advocates of the civil law finally prevailed.

Similar language is used in the constitution of 1870, which had subsequently replaced the constitution of 1849.

That this is so, gentlemen, is shown by the case of *Dow* v. *Gould & Curry S. M. Co.* (131 Calif. 629), at page 640, in which is was said:

> The only marked exception (to the adoption of the common law) is found in the section under consideration, providing for the separate property of the wife and the common property of both husband and wife.

Now, the community system remained in California, by virtue of the Treaty of Guadalupe-Hidalgo. It has always been there.

There is no discrimination, therefore, against the Eastern States and there is no manipulation against the income-tax laws of the United States. It is only a question, gentlemen, of whose income you are taxing.

The question of the value to be placed upon the dictum in the *Robbins case* has been raised here, and I feel that I shall have to say a few words about that. In the respect of judicial interpretation of the Constitution of California and the laws enacted under it, most of such judicial interpretation was made by jurists who were familiar with the common law and not with the civil law. The California courts used language such as indicated that the wife did not have an actual vested interest. And under the influence of those decisions the Supreme Court decided in the *Robbins case* that the income from community property could not be divided between husband and wife.

Now, whatever the imperfections of the California law were at the time the *Robbins case* was decided, they have been very definitely cured by act of the legislature in 1927, acting under a constitutional provision, when the community property system was restored to its original status by the amendment of section 161 (a) of the Civil Code.

Mr. Evans read you that section and explained it the other day and I do not believe it is necessary to repeat it, but the section has been judicially construed, and Mr. Evans did not call that to your attention, so that I do desire to do so.

The Supreme Court in the case of *Siberell* v. *Siberell* (214 Cal. 767), at page 772, said:

> This follows because the wife has always had at least a limited interest in the community property.

Citing *Stewart* v. *Stewart* (199 Cal. 318):

> In 1891 her rights were enlarged to require her written consent to gifts and voluntary transfers of it. In 1917 again her rights were enlarged to allow a division of the common property under certain conditions without a dissolution of the marriage ties, also requiring her signature to convey or encumber it. Again in 1923 sections 1401 and 1402 of the Civil Code were amended to give her testamentary power with the husband over it and in the absence of a will by the husband she, to the exclusion of the children, takes the whole of it. Lastly, in 1927, section 161 (a) was added to the Civil Code investing her with full title to one half thereof ceding alone to the husband the management and control thereof.

I am very sorry that the gentleman from Wisconsin had to leave. During the course of the hearings he has several times brought up the illustration and asked if it were not unfair that a man residing in Wisconsin or Pennsylvania could not divide the income between husband and wife, and therefore had to pay a higher rate of income tax, and he has used the illustration of salary alone.

I am going to cite you the California case which is authority on the question of salary alone. There is nothing in this particular case which I am going to cite except the question of division of salary. I think it is conclusive and states the law, and I do not see how the Ways and Means Committee, the Supreme Court, or anybody else can go behind it.

That case is *United States* v. *Malcolm* (282 U.S. 792). All there was in the income-tax return was salary. During the year 1928 Robert Malcolm and his wife were domiciled in the State of California and Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Co., a California corporation. Under the laws of the State of California, this being after the adoption of the 1927 amendment, this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for Federal income-tax purposes. Each reported one half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the return.

According to the certificate sent up to the Supreme Court, after the husband had filed his income-tax return for the calendar year 1928, as set out above, the Commissioner determined his return was incorrect in that the salary of $3,600 should have been reported by the husband alone, and accordingly the Commissioner determined against the husband a deficiency in income tax amounting to $18.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the Commissioner.

The questions certified were as follows:

> 1. Under the applicable provisions of the Revenue Act of 1928 must the entire community income of a husband and wife domiciled in California be returned and the income charge thereon be paid by the husband?

The second question was:

> Has the wife under article 161 (a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one half of such income?

The Court said:

> The first question as certified is answered: "No." The second question is answered: "Yes."

There is a very simple, explicit, and complete case dealing with nothing but salary, and I believe that it completely answers any objection that the gentleman from Wisconsin has raised here from time to time.

Mr. COCHRAN. Would you object to a question?

Mr. BUCK. Certainly not, Mr. Cochran.

Mr. COCHRAN. I take it that you are a married man?

Mr. BUCK. I am, sir.

Mr. COCHRAN. The salary of a Congressman is $10,000 a year?

Mr. BUCK. I hope it will be again.

Mr. COCHRAN. We will use that figure for illustration. Under the 1934 Revenue Act, assuming that I have no income whatever other than my salary as a Member of Congress from Pennsylvania, I will be compelled to pay $380 income tax, while you, receiving exactly the same salary, and assuming that you have no other revenue, being a resident of California, will pay $140. In other words, my income tax is 271 percent of what yours is. Now, basing your answer upon considerations of equity, should there be that difference between citizens of the United States similarly situated?

Mr. BUCK. I am sorry, but I think the gentleman from Pennsylvania was coming down the rostrum and did not hear what I read from the case of Poe against Seaborn on the question of equity.

Mr. COCHRAN. I heard it, and I want to say, without any criticism of the gentleman from California, but as a generalization, that I be-

lieve all this very interesting discussion of the community-property law and decisions of courts of last resort on community-property law situations are entirely beside the question here. Nobody is disputing what the law is. To me the citation of these numerous authorities does not deal with the inequity and inequality which exists.

Mr. Buck. There is an inequity which exists, as the gentleman no doubt knows, in the administration of the bankruptcy laws throughout the United States. There are certain exemptions allowed in certain States that are not allowed in others. There are other phases of the bankruptcy law, and in that connection also the Supreme Court has held that the uniformity is not intrinsic, that it is geographical, and that any matters that the State law differs in cannot be read into the Federal statute.

I see no difference between that and between this case of the income from community property.

Now, as a matter of fact, Mr. Cochran, I do not think that you have taken into consideration in your figures the fact that my wife will also pay an income tax on the other half of the community property, so that there is not a difference of 271 percent. There is a difference, and I will admit that, but it is nowhere as near as great as the amount which you have figured.

Mr. Hill. Go ahead and finish your statement, but I would like to have you yield when you get through.

Mr. Buck. I would like to finish the matter of the Robbins case.

Mr. Hill. My question is on that point.

Mr. Buck. Then go ahead.

Mr. Hill. Of course, this bill before the committee now deals not alone with the salaries of the parties in the community-property State but it deals with all the community-property income, and would place the burden of tax solely upon the husband or the spouse having the control and management of all the community-property income, including salaries of both spouses, including the community income from whatever source, and in that particular, when you take it by and large and take a comprehensive view of it, this bill would work an inequity against the community-property States as in the non-community property States the spouses can by a voluntary arrangement between themselves divide the property and each one return separately his or her income from his or her property, and it is so divided. You cannot do that in the community-property States, if this bill should become law.

Mr. Buck. That understanding is correct, sir.

Mr. Hill. Certainly there would be an inequity there against the community-property States.

Mr. Buck. I am not going to cite many examples, but I am going to try to point out a few of them briefly to you in a moment or two.

But, to continue my answer to Mr. Cochran, I want to say the theory and the fact upon which the community-property law is built is that the wife is an actual contributor to the family as a whole. And it is so. In many cases there are situations where the wife is putting in her time, engaged in work with her husband, such as on the farm—and I happen to be a farmer myself and I know the conditions that exist there. The wife is drawing no salary and the husband is drawing no salary. When the crops are sold and the

profit figured, how are you going to establish the proportion of the profits earned by both of them except by the partnership created by law?

Mr. Cochran. Do not wives in other States assist their husbands to some extent?

Mr. Buck. Yes, sir; but if the other States do not want to give the wife her vested interest in the income, which the community-property State gives, then that is their affair. In my opinion there is no reason why inhabitants of the community-property States should be penalized because the other States do not adopt as liberal and as enlightened a plan toward their womenfolk.

Mr. Cochran. You are making a very persuasive argument, but I cannot say that I am convinced.

Mr. Buck. I will continue a little further and perhaps I can persuade you.

The German Visigoths had that as a foundation in saying that the wife was entitled to a half interest. That is the theory and that is the fact.

Mr. Cochran. I want to ask you another question in view of that statement. I followed your argument and you traced the community-property law from Spain by way of Mexico, as I got it.

Mr. Buck. Yes, sir.

Mr. Cochran. Did the law of Spain or Mexico give the wife a vested interest or merely an expectancy?

Mr. Buck. The earliest law on the subject in Spain was the Fuero Real of Alphonso the Learned, in 1255. It dealt not with the question of the use of the income, for the reason that there was no income tax, but it gave the wife a vested interest in that property, so that the husband could not deprive her of her inheritance in the property. Do you follow me?

Mr. Cochran. Yes, sir.

Mr. Buck. In other words, he had the management and control then, as he has now, and there was no question involved in those early days of the disposition of the income in the meantime.

Now, as a matter of fact, there has to be some kind of an agent for the disposition of the income of the community, whatever it may be. Sometimes it is only earnings, until they reach such a point that they can be banked and invested in something, and then the income from such investments becomes also community property.

The community-property law says that the title to the wife vests at the minute that that income is earned. It does not come through the husband, and there is no transfer of it. I will cite you two or three cases in California which will prove that that is the law. There is no question of transfer.

In the meantime, I will dispose of the Robbins case. What the gentlemen from the Government are hanging their argument on is the dictum of Justice Holmes in the Robbins case indicating that he thought perhaps the Congress could go further than it did and enact a law to tax the marital income.

I think one dictum is as good as another. Those of you who have practiced law know that none of them are worth much when the actual facts are presented.

Mr. Shallenberger. Did the Robbins case arise in California?

Mr. BUCK. Yes, sir. It has been cited several times, Mr. Chairman, and that is why I am referring to it. That was before the 1927 amendment. Now, at this point in that connection I want to cite the case of *Holden* v. *Hardy* (169 U.S. 389), and give you the following language, which indicates in my opinion what the Supreme Court justices at that time felt about the matter in connection with any form of substantive law that might be sui generis in our own country or in any of our possessions [reading]:

> In the future growth of the Nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexations might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which represented the growth of generations of inhabitants a jurisprudence with which they had had no previous acquaintance or sympathy.

As far as California is concerned, I have shown you in our community-property law that it came to us through the treaty with Mexico and the adoption of the original Constitution of Californa.

Now, I stated that the wife does not take anything through transfer from the husband. I want to show you very briefly what the state of the law is in California. The wife is entitled to obtain a division of the community property upon divorce. She is entitled to dispose by will of half of the property if she pre-deceases the husband and to take possession of half the community property if the husband predeceases her, and even if he had made testamentary disposition to the contrary. This answers a question raised the other day.

I wish to cite the *Estate of Prager* (166 Calif. 450)——

Mr. COCHRAN. Let me ask you a question for information, Mr. Buck.

Mr. BUCK. Yes, sir.

Mr. COCHRAN. The husband dies and his wife acquires possession of one half the community property, we will say, in her own right. What interest has she in the other half?

Mr. BUCK. If he dies intestate, she would take either one half of it or one third according to whether he left children or not. He can will it away.

Mr. COCHRAN. He can will it away?

Mr. BUCK. Yes, sir. And she can will her portion away. She is entitled to treat as null and void as to her half of the community property any sale made by the husband's executors under a general power of sale contained in his will beyond what is necessary to pay the debts or expenses of the administration *Estate of Wickersham* (139 Calif. 652). She is entitled to void transfers by the husband which do not have her signature to the conveyance. With these powers, particularly this veto power that exists, it is obvious also that she gets nothing by transfer from the husband. The fact that at the death of a husband the community property is administered with the separate property of the deceased spouse does not show that the wife is an heir.

The administration is solely for the purpose of estimating the proportion of the community debts which are chargeable against her half, so that the court may enter an order to the husband's administrator or executor directing him to turn over her one half less the half of the community debts that she owes.

This has judicially been determined, not in California but in Arizona, in the case of *La Tourette* v. *La Tourette* (15 Ariz. 200), where the court used the following language:

> The community estate passes with the debts against it, and therefore it is proper for the court to assume such jurisdiction as to determining the amount of charges and debts and direct payment out of the community property. It is immaterial that it be called a decree of distribution or a judgment or an order fixing the wife's interest in the community property free of debts which she is entitled to demand and receive from the executor.

Members from common-law States are very apt to think only of the theoretical tax advantage that the husband may have under this income-tax provision of the United States. However, there are a great many cases—and this is particularly true in California, where a great many professional writers, actresses, business women of all kinds, in literary and professional life, live—where the wife earns a very large amount of money and contributes to the community income. That sum must be added to the husband's income at the present time and the total divided between them. In common-law States the wife's earnings are not taxed to the husband, even one half of them. One half of them are in California and the other community-property States.

If you adopt this bill, as to that provision you do not promote uniformity. You enact a gross discrimination against the women of community-property States. I understand from the evidence which I have heard heretofore that it would be even more grossly discriminatory to the women of Louisiana than California, because in that State the wife's separate property must go into the community fund as well as the earnings. I am advised that that is the law in Idaho as well.

You have heard a great many of these examples cited, but just to pass over them briefly I want to show you that there are disadvantages as well as advantages, if the division of the income is an advantage under community-property law.

If a man has a good business, worth $100,000, which he has built up entirely through his own earnings, acquired and reinvested since marriage, and his wife dies, leaving a will, his wife's heirs can demand liquidation of that going business or half of its going value. The husband in common-law States runs no such risk, for he is the owner of all the income that he makes from the time he earns it, no matter how he reinvested it.

Suppose a husband had the same sum of money, $100,000, and the wife contributed nothing. The wife can will $50,000 of that away, even to strangers, and even though the husband had children by a former marriage; and no such right troubles our friends from common-law States.

Here is a point brought by the gentleman from Washington. In a common-law State, a husband and wife desire to decrease their income tax, and under such circumstances they can enter into voluntary agreement to do this. I submit in all fairness there should be no distinction in the taxing power of the United States, as between a voluntary agreement which may be entered into and an agreement which is fixed by the law of the particular State.

I note that this particular example has not been cited by anybody, but it occurs to me: Suppose you adopt this bill. The tax on the combined income of the marital property would be assessed to the husband, assuming he was the managing spouse. We will assume that subsequent to the end of the calendar year, but prior to the payment of any tax, the husband dies. The wife will immediately enter into enjoyment of her half of the community property, which will be taken from the community estate. The tax which has been assessed, however, is a personal obligation and will remain collectible from the estate of the husband, which will consist of his half of the community property and such separate estate as he may have, thus working an absolute and direct injustice on the husband's heirs. There may be children by a former marriage, let us say, with which the present wife has no connection at all.

I think the other conditions under which community property is administered and income received in the community States have been pretty thoroughly discussed here. I know so far as the legal side is concerned, they have been ably handled.

I want merely to list at this time a series of cases in volume 282 U.S., so that anyone who may look through the hearings will have the reference, and with your permission I will hand them to the reporter. There is a list of 5 cases, 1 from Washington, 1 from Arizona, 1 from Texas, 1 from Louisiana, and 1 from California, which have clarified the law on the subject.

The cases referred to are as follows: *Poe* v. *Seaborn* (282 U.S. 101, Wash.); *Godell* v. *Koch* (282 U.S. 118, Ariz.); *Hopkins* v. *Bacon* (282 U.S. 122, Tex.); *Bender* v. *Pfaff* (282 U.S. 127, La.); *United States* v. *Malcolm* (282 U.S. 792, Calif.).

Mr. Buck. Contrary to the popular understanding among certain members of the committee, there was never a single dissenting opinion in any one of these cases. The net result of the history, development, and construction of the community-property laws shows that the enactment of this bill would be discriminatory and not produce uniformity and will ignore the basic laws of eight States and the unqualified decisions of the United States Supreme Court.

I think I have shown you that the development of the community property law is not a local growth within the United States. It is a development of the civil law that was originally established in certain portions of our present country by virtue of the laws of France and Spain which then owned that particular territory. If we were by some means to take over the Province of Quebec and incorporate that in the United States of America today, you would take those people into the United States with the same system of laws which they now have, until and unless they desire to change them. And you would find that this same law prevails in the Province of Quebec.

Now, the mere fact that the good citizens of Michigan in 1810 and of Arkansas in 1807, and elsewhere, saw fit to go over to the common law is no reason why they should object to the citizens of California and Texas and Louisiana and Washington and Arizona, who do operate under a system of law entirely different from that, to so continue to live, which laws must be administered and recognized by the Congress of the United States as a substantive law of its own kind.

I have only one more thing to say. It has been urged that the question of whether an income tax can be levied upon the basis of management rather than the basis of ownership has never been decided by the Supreme Court, but I feel that the common definition of income, which means gain derived, means that there must be an actual profit to the taxed individual before there can be an assessment against him. It is not sufficient to say that he is in control of the property. If he is in control of the propery as a trustee, in case of a trust, the assessment made against him as trustee is not commingled with the assessment against him as an individual.

Should you regard this marital property as an entity, you would have to levy your taxes against the marital property as an entity and not commingle that with the separate estate of the husband or wife, whoever was managing it, and that would not get the money which you gentlemen are after, because you would have to start with the lowest bracket on the marital property. There is no point from the Government's view in trying to do that.

I am supported in this statement by the opinion of the Acting Attorney General, Mr. Mitchell, rendered some time ago in 35 Opinions of Attorney General, 265, which I quote verbatim as his conclusion:

> As the nature and extent of the wife's interest in the community income are matters determined by the laws of the State, Congress may not by enactment change the nature of the wife's interest.

That, gentlemen, is what this bill proposes to do.

It is a difficult problem for members who are trained under the common-law system, I know, to realize that we in the West and Southwest live under a different system of laws, yet such is the case.

I trust that this brief presentation of the essential differences in such laws will cause you to realize that there is not possibility of obtaining uniformity through this particular legislation and that therefore no favorable action should be taken on the bill. I thank you gentlemen for your patience and courtesy in listening to me.

Mr. Hill. Before you leave the stand, under the original common law which obtained in the common-law States of the United States, when a woman married a man, whatever property she brought to that marriage became the husband's absolute property, both real and personal?

Mr. Buck. That is correct.

Mr. Hill. And whatever earnings she might make would also be his property?

Mr. Buck. Yes, sir.

Mr. Hill. And in the common-law States were that rule of property continued up to the present time, all the income from whatever source after marriage would be the income of the husband and be taxed to him. But under the liberalized policy that the different common-law States have followed through the years, and since our Government was established, the wife's property rights have been recognized separate and apart from the husband's so that they do have a division of the income and each returns his own income for the purposes of taxation.

Now, would it not be just as appropriate to say that these common-law States have manipulated their laws so as to evade taxes, as it is

to say that the community-property States have manipulated their laws so as to give advantage to the spouses under the community-property law States?

Mr. BUCK. I think it would be just as fair to say so. I do not think they have in either case, so far as that is concerned, and I want to go further and say this: I have no doubt that any one of these common-law States at the present time could repeal all of its liberalizing amendments and restore the common-law status, but I do not think that the Congress of the United States has any power to make a law which will say that the wife's separate income in those States is the husband's.

Mr. COCHRAN. I do not think that we should say that any State was trying to evade income tax. Property rights by statute in the common-law States were all established long before that particular law was enacted.

Mr. SHALLENBERGER. One question, Mr. Buck.

Mr. BUCK. Yes, sir; Mr. Chairman.

Mr. SHALLENBERGER. You brought up the problem which would be presented if Quebec were to become a part of the United States, and they have the community-property system there.

Mr. BUCK. They do.

Mr. SHALLENBERGER. Do you hold that our Congress could not change the manner in which the taxation laws should be applied, so far as they affect the Nation, without the consent of those people, if we were to take them in as a Territory or a State? Is that your contention?

Mr. BUCK. Congress may enact a general law providing what portion of the income may be taxed, providing the rates, and the rates will apply to Quebec or anywhere else, but what is income must be determined, I think, particularly in the light of this case (*Poe* v. *Seaborn*) and the opinion of the Attorney General, according to the laws of the States themselves.

Mr. SHALLENBERGER. On this question it appears to me that the law, in your contention, is at least in part based upon the idea that even though they come into our Union as a separate State or territory, from a country having a different law, that we would be bound to hold in conformity with their laws, without their consent.

Mr. BUCK. I do not want to read this again.

Mr. SHALLENBERGER. You need not read it again.

Mr. BUCK. But I refer you for an answer to that situation to the case of Harden versus Hardy, cited above, and I think that is the opinion of the Supreme Court on the subject.

Mr. SHALLENBERGER. You think that is what they have said?

Mr. BUCK. Yes, sir.

Mr. HILL. In that connection, these community-property States, Mr. Buck, were admitted into the Union with the body of law which they had then, and with the recognized power to control the status of property rights as between husband and wife.

Mr. BUCK. I think there is no question about that.

Mr. HILL. That comes in as a part of the substantive law and the substantive right of States.

Mr. BUCK. I think there is no question about that.

Mr. SHALLENBERGER. Thank you very much, Mr. Buck.

STATEMENT OF HON. JOHN F. DOCKWEILER, A MEMBER OF CONGRESS FROM CALIFORNIA

Mr. DOCKWEILER. Mr. Chairman, I have not heard all of the arguments which have been given pro and con concerning the proposed law to compel those in community-property States. who should render a report on community property, to make those persons pay a full tax instead of being allowed to divide that tax between husband and wife. So that I am liable to use some arguments which have been used heretofore. I am liable to be repeating some of those things. I regret, for that reason, that I come before you not knowing all of the arguments which have heretofore been given.

California, along with the other seven States that inherited a community-property law, is perhaps the most important of all the group of States, with maybe Texas next, because the record might show that California pays more income tax than do the other community-property States.

Now, Californians—and I shall speak for them only—are not "slickers." We are not trying to get by with something which we are not entitled to. It is within my memory that the Democratic Party first projected in our political atmosphere the idea of an income tax. It was subsequently enacted into law and I remember the first income tax. I was just commencing to practice law. So, that long before an income tax was in existence California had a community-property law.

I happen to be a native of California, and my father was born in California 65 years ago, when the pueblo of the Queen of the Angels only had 2,500 souls in it. But it was distinctly Spanish. My father speaks Spanish because the neighbors spoke Spanish. So that it is within my memory that California was distinctly Spanish in influence and language and the descendants of those families live in California only a generation apart from the ratification of the Treaty of Guadalupe-Hidalgo.

I was very much interested in my colleague's statement that if the United States, in an acquisitorial treaty acquired land from a territory that has a prevailing jurisprudence different from the common-law jurisprudcence, that it would be necessary for the Government of the United States, in making its laws, to take into consideration and regard those territories that have a peculiar jurisprudence before they became a part of the Union.

Now, I contend that if you enacted this proposed statute into law, it would be violating that sacred treaty between Mexico and the United States.

In California we have codes. You have been told that, no doubt. We have the civilian code, code of civil procedure, and the penal code. If you were to pick up those codes and read them, they would appear to you, if you knew anything of civilian law, exactly as if you were in Japan, taking up some lawyer's task in the courts, exactly as if you were in Spain or France conversing with a lawyer of Spain or France, and picking up the codes, the only distinguishing exception, of course, being that they would be in their mother tongue.

The language of our codes in many instances is almost the same in defining certain rights and liabilities. Human conduct in my State is almost the same as if you would pick up the code of Justinian. I happen to have had the good fortune of studying civil law at Harvard, not with an idea of practicing it, but just from the standpoint of erudition, so that I would understand the traditions of the laws of California, and what struck me forcibly in reading the codes, the translations of the civilian codes of the continent was that the language was so similar to portions of the California code, and while, of course, the codes of the continent are interpreted not so much by court precedent but by "glossators", so-called, because they are men who are erudite in the law and give the interpretation of a particular code section, nevertheless I have known it, and I myself would not hesitate if I were in a quandary in California as to how to determine and interpret the language of a code section, touching on community property or communal interests—and I could cite as a final authority a civilian glossater and develop the matter.

Now, getting back to the salient part of this argument, I want to say again that if the Congress of the United States should pass the law that you are now considering, so far as California is concerned and he lands applied by the United States under the terms of the treaty of Guadalupe-Hidalgo, the United States would be violating the terms of its treaty with Mexico.

Now, what practical consequences might ensue might really be nothing, in view of the fact that the Mexican Government is not a very strong Government and perhaps would not be in a position to insist upon its rights.

But I remember that I was in the State Department just 2 weeks ago when a question of land titles in the State of California was involved, and I was asked to review the treaty and some of the United States Supreme Court decisions under this treaty, and it refreshed my memory of the verbiage of this treaty, and there that very same section of this treaty was involved, and they said, in effect, that the inhabitants, the Californians, who were Mexican citizens at the time of the transfer of California to the United States, that those Californians should have all the rights concerning that property as they had had previously under the rule of Mexico. That was, in effect, the gist of it. It is the usual phraseology in treaties of acquisition.

Now, if that had not been put in that treaty in so many words, the rule of international law itself would have compelled the United States to recognize the property rights of Californians, the Mexican Californians. So that it was not a question of putting it in the treaty but, as a safeguard, those in charge of preparing treaties always put in a paragraph that states that the property rights that have grown up concerning the people that had inhabited the territory so acquired shall continue.

So, it would be a distinct violation of the treaty, which I mentioned, if this law were passed and the descendants of the Californians would have a perfect right to go to the State Department and show that they were being discriminated against, and if they so desired they could call the Mexican Legation's attention to this violation of the treaty.

Mr. Cochran. Do you object to being interrupted at this point?

Mr. Dockweiler. No, sir; I do not object to any interruptions.

Mr. Cochran. Is it not the law of Mexico, under her community property law, that the wife gets a mere expectancy and does not have a vested interest in the community property?

Mr. Dockweiler. I do not know the community property law of Mexico. I think that when it reached California it had been revised and made more definite. I do not think, from what you say, that the Mexican community property law, no more than the Spanish community property law, is as strongly in favor of the wife as the California law.

Mr. Cochran. I wish to state that our Treasury Department has ruled that under the laws of Mexico the wife does not have a vested interest in the community property or its income, but a mere expectancy and that therefore an American citizen who was a resident of Mexico must report all of the community income in his return.

Mr. Dockweiler. That is quite possible. I did not happen to know exactly what the Mexican law was, but that is quite possible. They are community property States, from the international standpoint, I mean, which have different shades of meaning, and which give different force to that and interpret in a different way the actual interest of a wife in the community property. Some have only said it was an expectancy. We have said that it is more than that. It is a tangible, divisible right.

Mr. Cochran. Then there would be no violation of the treaty of Guadalupe-Hidalgo in that case?

Mr. Dockweiler. There would still be.

Mr. Cochran. The vested interest given to a wife in California is a matter of legislation, is it not?

Mr. Dockweiler. I would have to know exactly what the community-property law was which prevailed at the time of the signing of the treaty. I think it was 1852, and I would have to know that in order to be able to answer exactly that question.

Mr. Cochran. Does not the wife in California today receive her vested interest in the community property under a statute of California?

Mr. Dockweiler. A statute that is the process of development of the law of California; yes, sir. I will put it that way.

Mr. Cochran. It is operative today, is it not?

Mr. Dockweiler. Yes, sir; it is operative today. All of our codes, or particularly the codes affecting the community interests, have been clarified in the sense that they have been enacted and amended and reenacted and reamended on a great many occasions, principally because of the confusion of land titles in California.

Mr. Hill. Are you through, Mr. Cochran?

Mr. Cochran. Yes, sir.

Mr. Hill. Aside from the question of treaty rights, the Federal Government, under our system, is one of delegated powers.

Mr. Dockweiler. That is correct.

Mr. Hill. It has only such powers as are delegated to it through the Constitution of the United States.

Mr. Dockweiler. Which were surrendered by the States.

Mr. HILL. And the rights and power to determine property rights of the individual are not among those delegated powers.

Mr. DOCKWEILER. You are perfectly right, Judge.

Mr. HILL. Of course, if at this time the Republic of Mexico should change its laws and vest in the wife an absolute property right in the community property, the Government of the United States, of course, would recognize that in dealing with its citizens resident in Mexico or having property in Mexico. But the big proposition here is that the Federal Government, under the Federal Constitution, has no power to determine property rights or the status of property rights as between husband and wife, and when a State is admitted into the Union it takes the same status as those States have which are already in the Union, and the Federal Government has no additional power as to the newly acquired State over and above what it has as to the States already in the Union.

Mr. DOCKWEILER. That is right. That is one place where the Constitution was emphatic when it said in conclusion, you might say of the entire Constitution that "this is a delegation of power from the Thirteen Colonies or States, and what has not been written in here as authority to the Congress is reserved to the several States."

Getting back again to your point, Mr. Cochran, that when this Nation acquired territory and took in California it did not mean—I do not think it could ever be so construed—that it was necessary for the code laws of California to remain static from 1852, without improvements, without evolution, and we have proceeded through the years from 1852 to bring about the evolution of those laws and to develop them into a more definite form and in order to conform to the Anglo-Saxon mind which came into the State. Do you see my point?

So that I still think it would be violative of the spirit of the code treaty if the United States would enact a law which would effect California this way. Speaking of the other territories which were acquired and later became States and which had community-property laws, some of them were acquired through the Gadsden Purchase and some through other means, but so far as California was concerned, there was a distinct treaty entered into covering all of our area.

Mr. COCHRAN. I would like to ask a question at this point. Is it your contention that this bill would change the property rights of citizens of California?

Mr. DOCKWEILER. I am positive of it. I do not think the bill would be constitutional in the final analysis, and I am going to get to that point. I do not think you can define what property rights are in my State, or in any State in the Union.

As the judge says, from my study of the law, the United States has no residual authority anywhere to be found in the Constitution so that it can require that California consider the definition of property in any other State.

Mr. COCHRAN. I quite agree with you there, but I contend that this bill does not change property rights in any of the community-property States.

Mr. HILL. If you do not mind a further interruption, it does say that for the purpose of determining income-tax liability, that the property of a marital community shall be considered as the property of and the income of a marital community, shall be considered as

the income of the spouse who has the management and control thereof in the jurisdiction where the marital community exists.

If you invade the rights of an individual in an indirect way, as it may be contended that this proposes to do, you are certainly depriving a substantial right, just the same as if you were to attempt to say to California and the other community-property States, "The property laws in your State should be so and so."

Mr. DOCKWEILER. I agree with you, Judge, that it is only a circumvention to try to get around a definition of what is "income" in the State of California, because the definition of property is divided into real, personal, income, or anything which is of value and possessable as property. I think by a circuitous route you are really defining for California what is the type of property known as "an economic income or increment."

I do not care what kind of law you make, you will run up against the famous case, which you will doubtless remember, of Hick Woo and Hopkins, where San Francisco passed an ordinance which on the face of it was a perfectly good ordinance, and on the face of it was legal and was statutory and there was nothing wrong with it, and nobody could find anything wrong with it, but in the practice of the local board exercising power under that it was held that it was exercised in an unlawful way and the Supreme Court held it bad because it could be exercised in an unlawful way, because the Chinese of San Francisco were being discriminated against through the avenue of what appeared to be a perfectly good statute or good ordinance.

I come not only from California but from a district which is peculiar in many other respects; from that new area in Los Angeles, the west end of the city, with which most of you are probably familiar, or somewhat acquainted, that area which comprises a little community called "Beverly Hills." Perhaps in those few square miles there are more millionaires stacked up than in any other similar area in the United States.

It is comparable to the city of Pasadena, which is not in my district, but where we have families which have come to live there from every State in the United States. They come out of your State of Nebraska, Mr. Chairman, and they have made their millions. They come out of your State of Washington, and they come out of your State of Ohio, and they come into Beverly Hills to live, or if it is not exactly Beverly Hills it is contiguous territory along the Hollywood Hills, along the great sloping stretches of the Pacific known as Santa Monica and the Wilshire district in Los Angeles. I can go up and down that strip of land and I would not find 1 soul out of 10 which would have been in California longer than 3 or 4 years. They have come there for the purpose of settling down.

Now, anyone out of Ohio, Kentucky, Massachusetts, Rhode Island, or the rest of the States would view the community-property law and say, "My goodness, we are giving you fellows all the break. I do not know whether it is from legerdemain or not or a particular statute defining property, that they are in position to divide the income and save themselves a great measure of this tax burden."

I can understand among my colleagues, those that come from those States, that they would have that attitude. It would seem the

natural thing to do. That perhaps may be the first reason for calling up a bill such as this. Maybe the second reason is the fact that we must scratch every nook and cranny to get income, to get money for an impoverished government.

But these gentlemen who have come out of Boston, of Cleveland, of your State, and the other great centers where money was made in great quantities, they have settled down in the Sixteenth Congressional District, strange to say, but they have not become citizens of California. Why? Because they are afraid of their lives of the community-property laws and the statutory laws of California. They would no more vote in my district than to have their neck chopped off. That is because they do not want to be construed as citizens of Los Angeles County or of the State of California. That is a condition which universally prevails in the Sixteenth Congressional District.

Mr. Cochran. Do you hold that opinion?

Mr. Dockweiler. I am positive of it. If you went to my State with a great sum of money, you would keep your main residue back home as these men do. They even keep their securities and their strong boxes back home and they go back home once a year to attend to business. But let them register to vote or get on the voters' rolls, or anything that would be an indicia of citizenship in my State, and they would leave my State before doing so.

Mr. Cochran. Do you find the same prejudice against this?

Mr. Dockweiler. There is a lot of prejudice. It is a lack of understanding. They do not realize when they have acquired the property in common-law States that just because they become a resident of my State or bring in tangible property into my State that it is impressed with a community interest. It is only the property acquired in California that is impressed with a community interest. It is because the whole thing is more or less a mystery to them and they do not want to get involved in such matters any more than they have to, and the simplest way is for them to conduct their business affairs, and let their attorneys or fiscal agents at home make their income tax out, and it is mailed back to them and the tax is paid.

If you could only go up and down the famous streets in Beverly Hills, with the famous mansions, I doubt if you lose very much money from those people because they are paying their taxes according to the rules and regulations of their own local State from which they came.

Mr. Shallenberger. Mr. Dockweiler, you are giving us some information which we have not had before, and I do not know whether it exactly applies to this case, but it is instructive. We have had a number of illustrations shown here where men are paid large salaries, where, under the community-property law, if they earned it in California, one half of it belongs to the wife. Take, for instance, the actresses that you read about, and who are receiving tremendous salaries in Hollywood. Those salaries, as soon as they are earned by those women, one half belongs to the husband, or do they retain their citizenship some other place?

Mr. Dockweiler. That would be true. It does not make any difference——

Mr. Shallenberger. If either earns it, the other gets one half?

Mr. Dockweiler. There is nothing peculiar there. I happen to have three of the greatest moving-picture studios in the world in my district. Ninety-five percent of the moving pictures are made in my district, Metro-Goldwyn-Mayer, the Fox studio with all the Fox studio engineers, and the First National. All these people live in and around the studios. The actresses which are highly paid have homes, like Harold Lloyd in Beverly Hills, and the Fairbanks estate is in Beverly Hills. Of course, it is true if the woman in the family makes $100,000 a year, if she is married, she is entitled to divide that up.

Mr. Shallenberger. Here is the point I want to bring out: Is she required to divide it up?

Mr. Dockweiler. No; she is not required to do so. She can make the return as she sees fit.

Mr. Shallenberger. There is no discrimination in the law between the husband or wife, whichever one earns the salary, their rights under the law of your State are exactly similar. Is that right?

Mr. Dockweiler. You are correct. We have had a case where moving-picture actresses have gotten into big money, and they get divorces because they are not living in a happy state, and before they get into big money they usually get divorced from their husband, because we have had the experience of the husband going into the court asking for a divorce and securing an alimony judgment and making their wives support them. The community interest goes that far.

Mr. Shallenberger. I thought I read from the testimony here that in some cases the husband's control of the income was sufficient so as to raise a question about the wife retaining absolutely her one half of the income. Of course, under an ordinary common law, such as the law under which I was raised, the husband being a little more supreme in the management of the family than the wife was, that situation would not prevail. I wondered whether in your interpretation of the law you had considered or had affected that right of the husband in any way in the matter of earnings.

Mr. Dockweiler. Yes, sir; she has a distinct estate.

Mr. Shallenberger. They are the same?

Mr. Dockweiler. For instance, if he got a divorce on the ground of adultery, he could have a division of the community property in my State.

Mr. Shallenberger. You do not attempt to protect the wife in any way in her full control of the property adverse to the husband because she is the wife and he the husband?

Mr. Dockweiler. No, sir.

Mr. Shallenberger. You consider them the same in either case?

Mr. Dockweiler. They are regarded in that way. You are right in your view on that.

Mr. Hill. If they are citizens of California, and the earnings are made in California, it is community property?

Mr. Dockweiler. Yes, sir.

Mr. Hill. Whether it is the husband or wife which earned it?

Mr. Dockweiler. That is right.

Mr. COCHRAN. As a matter of information, suppose the husband and wife are not legal residents of California, but are actually living there, and the wife is a moving-picture actress with one of these large salaries. Is the husband entitled to one half of her salary?

Mr. DOCKWEILER. No. Hers would be a very determinative case. The case of Greta Garbo, for instance, who is in there temporarily under a 6 months' contract, if she would make $100,000 during that period, even though her husband came and resided with her in California, he would not have a right to compel a division of those earnings as community property. Of course, the idea of residence is difficult to determine because it is a question of intention.

Mr. SHALLENBERGER. The determinative factor is whether or not they are citizens of California?

Mr. DOCKWEILER. Yes, sir; and to become a citizen of my State is purely a question of intent. That is why the men who come to my State, particularly the rich men, do not want to leave any indicia of residence. We have had so many cases where our State inheritance tax evolved entirely upon the question of voting, trying to find some signs which existed to determine whether a man was a resident of my State, and the courts have decided that where there is a record of voting, that the preponderance of the evidence was to the effect that the man lived there and was a resident of the State, if he voted.

These men avoid every act on their part which might be indicative of their being residents of the State.

Mr. SHALLENBERGER. I guess "domiciled" is a better word.

Mr. DOCKWEILER. Yes, sir; domiciled. There was a point brought out by my colleague, Mr. Buck, that a wife has a right to make a will. One of the most disconcerting things about the community-property law, as it stands in California, is that a wife has the right to make a will, and a man might be in perfectly good health and his wife sickly, and she might desire to turn over one half of her end of the property, which is one half of the estate, assuming that it is one half of the estate, if it is all community—she might turn it over to her sister or her sister's family. That has caused a great many uncomfortable situations in California because the wife has made a will and the husband finds after the funeral arrangements are all over, that the wife has given away one half of the estate to her sister's children, and he may find himself in a position where he has to dispose of the domicile, the home, which is one half hers, in order to liquidate the property for the heirs of the wife.

All is not gold that glitters. We, because of certain agreements started out on this community-property law, and more or less the civilian law, and the definition of civil rights, and, of course, we cannot change. You gentlemen in the far-eastern States have started out on the other foot, the common law interpretation, and all your laws have developed along that line, and you could not change to our rule if you wanted to, without disturbing property rights that have grown up, valuable rights which have grown up in the States. We are not so happy about our community-property law. It has been interpreted and reinterpreted by the courts until it has finally refined itself down to a point where it has been a discomforting thing to the citizens of California unless they are living in perfect connubial happiness, and that condition does not seem to prevail, that condition of human affairs does not prevail quite as universally as it did in your father's time and in my father's time.

Let us see whether the United States would gain a great deal by trying to enact this law and impress the people of the community-property States with the necessity of making one report for the entire income of the family. Of course, a man would be a fool not to say that it was done under protest, particularly in the light of the evidence which you have had here, which casts sufficient doubt upon the legality of the law. As to whether it would be good, there is sufficient doubt in the matter so that a man would not pay except under protest. I know none of my clients would pay any income tax under such an arrangement unless he paid it under protest. What have you got? You would have a good many million dollars in the Treasury, but it is earmarked immediately and is not worth a whole lot when you have got to pay it back.

I recall during the war that the excess-profits tax provided for things which resulted in huge incomes for the United States, amounting to a certain figure, but I am afraid to express the figures because it has faded from my mind—but these excess war profits taxes were levied, and what happened in the last decade? It was found that the law was not good as to a particular manufacturer or concern and it did not cover the items, and for the last 10 or 12 years we have been giving that money back.

It was money which was not worth anything because we have had to dig down into the taxpayers' pocket to give it back. Through the Mellon regime we gave back almost all we secured under the Wilson excess-profits war taxes, as I remember from reading an article.

What would be the good of levying a tax on States when eventually there is a grave possibility that this money would have to be given back if the Supreme Court found that the statute was illegal?

There would be this benefit: You would be getting it for the time being, during a depression period, but would have to pay it back, and I hope when you pay it back we would have more prosperity.

What are you really trying to tax here? What you are really trying to tax is not the distinct income of the wife and husband, but you are trying to attack the idea of management of agency. If the husband in California, or in the State of Washington, or one of these other community-property States, has the right to control the income of the community, why, therefore, we will just levy the tax against that man or that person who has that control.

It might not always be the wife or the husband. It might be the wife. The husband might be a sick man and not attend to affairs, and the wife might be making all the money in the family. Whoever it is, you are taxing that agency of control. You are trying to levy a tax against connubial management or agency. I do not think that that is good law. I do not think that you gentlemen or the Ways and Means Committee or the Congress want to pass a tax law of that character.

You will say, "Well, are we going to continue to let the community-property States have this advantage over the common-law States of the Union, over the other 40 States in the Union?"

Of course, you might get at it from the standpoint of letting all husband and wives throughout the 48 States of the Union divide their income. That would be in the nature of community income. Then all of those States are on a par. That would result in this: You would have income treated alike. That would be a fair means rather than singling out a State of the 48 States and saying, "Here, you fellows have an advantage because of the divisions which you have of your community property, and since you have that advantage we must find some way to wrest it from you."

I do not think that is a good way to make laws. I think the best laws are laws which are universal in application.

I don't know whether I make myself clear, and I do not know just exactly how I would prepare the law, but I would say, revise your formula for applying the tax law so that there will be no advantage to Californians rather than striking at Californians and the citizens of the other seven community-property law States.

Mr. COCHRAN. That is just the purpose of this bill.

Mr. DOCKWEILER. As I said, Californians are not "slackers." They have not had this law just for the purpose of income-tax payments. The law has been with us since we were born and was with us from time immemorial, and we take the situation as it is. We will take advantage of that situation because it has disadvantages, as I have pointed out.

Mr. HILL. The taxpayers in the other 40 States have the power and the right to divide their incomes and make separate returns and they do it?

Mr. DOCKWEILER. Yes, sir.

Mr. HILL. Now, then, if you force upon the 8 community-property States the restriction that they must return their income in one lump sum and tax it in one lump sum, are you not imposing upon them a disadvantage that does not apply to the other 40 States?

Mr. DOCKWEILER. Yes, sir. As you say, the other States have a right to reframe their statutes. They could go right back in the next legislature, and even though the particular laws of their States were not of such character, they would have a right to redivide income, to write such a bill and enact it into statute.

Mr. HILL. They have the right under existing law to divide property between themselves and subsequently make separate returns on the income from that property.

Mr. DOCKWEILER. Yes, sir. I was surprised to hear the previous testimony just before I stood up here.

Mr. HILL. You are not trying to get away from that right under the law here, but this bill would deprive the eight community-property States of a similar right.

Mr. DOCKWEILER. I made a note relating to letting the other States do what California, Washington, New Mexico, Arizona, and Texas do, if they want this advantage. When we get to the point where the United States is universally blanketed, with every State having done what California and Washington has done, then it is up to the Ways and Means Committee, as a proper committee to function for that purpose, to devise ways and means for income, and then to revise the United States statutes so that the rest of the people would be treated 100 percent the same. If everybody is cutting their income in half and giving the wife a chance to file a return and the husband to file a return, dividing the tax levied, it is up to Congress to take care of those changing conditions and the evolution that develops and revise the law to take care of the particular picture as it presents itself, the economic picture in the United States.

I do not believe I have anything further to say. I had some cases here, but I did not want to argue the matter so much from the standpoint of the cases and the decisions and precedents, as from the practical standpoint. Thank you.

Mr. SHALLENBERGER. Thank you very much, Mr. Dockweiler.

(Thereupon the subcommittee adjourned at 11:45 a.m. to meet Wednesday morning, May 23, 1934, at 10 o'clock.)

COMMUNITY PROPERTY INCOME

TUESDAY, JUNE 12, 1934

House of Representatives,
Subcommittee of the Committee on Ways and Means,
Washington, D.C.

The subcommittee met at 10 a.m., Hon. A. C. Shallenberger (chairman) presiding.

Mr. Shallenberger. The committee will be in order. We have had presented to the committee a brief by Mr. Stam, counsel to the Joint Committee on Internal Revenue Taxation, on the legal questions involved here and an answer to that brief by Mr. Donworth, which will be made a part of the record in the order named.

(The documents referred to are as follows:)

Congress of the United States,
Joint Committee on Internal Revenue Taxation,
Washington, May 21, 1934.

Memorandum to Mr. Parker.

Reference is made to the statements of Judge Donworth of Seattle, Wash., in the hearings on community-property income, part 4, unrevised committee print, dated May 4, 1934. Judge Donworth contends that an income tax must be based upon ownership, for the reason that it is a direct tax. He admits that an excise or indirect tax does not have to be predicated upon ownership. This is shown by the following extracts from his statement:

"What is the basis of this whole Federal income tax and the law applicable to it as a national proposition? The basis, of course, is, first, the Constitution of the United States and, second, the interpretation of the Constitution made by the Supreme Court in the case of *Pollock* v. *The Farmers Loan & Trust Co.*, in 1895.

"In the administration of President Cleveland, Congress passed an income-tax law in a general way along the lines of the present law, varying, of course, much in detail. The Supreme Court of the United States held that law unconstitutional, because the Court said—and this touches closely the controverted point—an income tax is a direct tax and under the Constitution of the United States direct taxes can only be levied by apportionment among States in proportion to the census enumeration (pp. 97–98).

"Now, coming more down to date, the Supreme Court has said, since the adoption of the sixteenth amendment, that an income tax is still a direct tax, the same as it always was. The Court still adheres to the authoritative construction of the Constitution that an income tax is a direct tax. That authoritative construction was not overruled by the sixteenth amendment. It was accepted by that amendment.

"So, in construing anything relating to an income tax, we must bear in mind what the Supreme Court bears in mind all the time, namely, that the income tax is a direct tax, imposed by reason of ownership and computed in proportion to incomes rather than in proportion to population (p. 98).

"Later, in the case of *Bromley* v. *McCaughn* (280 U.S. 124), the Court sustained the validity of the gift tax imposed by the Revenue Act of 1924, and there held that the gift tax was not an income tax at all, but an excise tax and therefore not within the sixteenth amendment. I think the members of the committee readily see that there is a distinction between an excise tax

which does not necessarily have regard to ownership, such as an excise on the sale of tobacco or liquor and other things." (P. 109.)

I do not believe that the decisions of the Supreme Court justify the conclusion that an income tax is a direct tax. In discussing the subject, this memorandum is divided into two parts. Part I deals with the classification of the income tax prior to the sixteenth amendment and part II, with its classification after the passage of that amendment.

Part I. Income Tax Prior to the Sixteenth Amendment

Mr. Justice Fuller, in *Pollock* v. *Farmers' Loan & Trust Co.* (157 U.S. 557), stated the classification of taxes under the Constitution as follows:

"In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises."

The conclusions of the Supreme Court as to whether an income tax was a direct tax before the adoption of the sixteenth amendment are summed up in the second case of *Pollock* v. *Farmers' Loan & Trust Co.* (158 U.S. 601), as follows:

"Our conclusions may therefore be summed up as follows:

"First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

"Second. We are of the opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

"Third. The tax imposed by sections 27 to 37, inclusive, of the act of 1894, so far as it falls on the income of real estate, and of personal property, being a direct tax, within the meaning of the Constitution, and therefore unconstitutional and void, because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid."

The Supreme Court did not hold in the Pollock case that a tax on incomes from professions, trades, employments, or vocations was a direct tax. This is brought out by Mr. Justice White in *Brushaber* v. *Union Pacific Railroad Co.* (240 U.S. 1), in which in referring to the Pollock case, he said:

"* * * Moreover, in addition, the conclusion reached in the Pollock case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the Pollock case, insofar as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from 'professions, trades, employments, or vocations' (158 U.S. 637), its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past (id. p. 635). The whole law was, however, declared unconstitutional on the ground that to permit it to thus operate would relieve real estate and invested personal property from taxation and 'would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor' (id. p. 637), a result which, it was held, could not have been contemplated by Congress."

In view of the foregoing, it seems clear that prior to the adoption of the sixteenth amendment a tax on incomes from real and personal property was regarded as a direct tax under the Constitution, but that a tax on incomes from professions, trades, employments, or vocations was regarded as an indirect tax or excise.

Part II. Income Tax After the Sixteenth Amendment

Shortly after the decisions of the Supreme Court in the *Pollock* v. *Farmers' Loan & Trust Co.* cases, the sixteenth amendment was adopted. This amendment reads as follows:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The decisions of the Supreme Court rendered after that amendment seem clearly to justify the conclusion that the effect of the sixteenth amendment is to take an income tax on incomes from real and personal property out of the category of direct taxes and to put it in the indirect class of excises, duties, and imposts. As pointed out before, the Supreme Court has never held that a tax on incomes from salaries, trades, avocations, or employments is a direct tax.

The first case I wish to cite to justify the conclusion that the income tax is no longer a direct tax in the constitutional sense is that of *Brushaber* v. *Union Pacific Railroad Co.* (240 U.S. 1), in which it was contended that the income-tax provisions of the Revenue Act of 1913 violated the sixteenth amendment.

In that case, the Supreme Court traced the history leading up to the adoption of the sixteenth amendment and stated that the income tax of 1894 was held unconstitutional in the Pollock case for the following reasons:

"Concluding that the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution (157 U.S. 581). Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things, *it was direct on property in a constitutional sense, since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived, and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent.*" [Italics ours.]

The Court, after quoting the sixteenth amendment, then goes on to state:

"It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the Pollock case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided; that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment. From this in substance it indisputably arises, first, that all the contentions which we have previously noticed concerning the assumed limitations to be implied from the language of the amendment as to the nature and character of the income taxes which it authorizes find no support in the text and are in irreconcilable conflict with the very purpose which the amendment was adopted to accomplish. Second, that the contention that the amendment treats a tax on income as a direct tax, although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived forbids the application to such taxes of the rule applied in the Pollock case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity, and were placed

under the other or direct class. This must be unless it can be said that although the Constitution, as a result of the amendment, in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution. Indeed, from another point of view, the amendment demonstrates that no such purpose was intended, and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. We say this because it is to be observed that although from the date of the Hylton case, because of statements made in the opinions in that case, it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the amendment contains nothing repudiating or challenging the ruling in the Pollock case that the word 'direct' had a broader significance, since it embraced also taxes levied directly on personal property because of its ownership, and therefore the amendment at least impliedly makes such wider significance a part of the Constitution, a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby to take an income tax out of the class of excises, duties, and imposts, and place it in the class of direct taxes."

Another case in support of the contention that the income tax is no longer a direct tax is that of *Stanton* v. *Baltic Mining Co.* (240 U.S. 103). In that case, which also involved the constitutionality of the income-tax provisions of the act of 1913, it was still contended that the income tax was a direct tax.

In disposing of this contention, the Court made the following statement:

"* * * But, aside from the obvious error of the proposition, intrinsically considered, it manifestly disregards the fact that by the previous ruling it was settled that the provisions of the sixteenth amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived; that is, by testing the tax not by what it was, a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed. Mark, of course, in saying this we are not here considering a tax not within the provisions of the sixteenth amendment; that is, one in which the regulation of apportionment or the rule of uniformity is wholly negligible because the tax is one entirely beyond the scope of the taxing power of Congress, and where consequently no authority to impose a burden, either direct or indirect, exists. In other words, we are here dealing solely with the restriction imposed by the sixteenth amendment on the right to resort to the source whence an income is derived in a case where there is power to tax for the purpose of taking the income tax out of the class of indirect, to which it generically belongs, and putting it in the class of direct, to which it would not otherwise belong, in order to subject it to the regulation of apportionment * * *."

The Supreme Court also reaffirmed its conclusion that the income tax was not a direct tax in the case of *Tyee Realty Co.* v. *Anderson* (240 U.S. 115).

This same contention was also disposed of in *Cook* v. *Tait* (286 Fed. 409), affirmed 265 U.S. 47, in which the District Court made the following statement:

"Upon the assumption that an income tax is a direct tax, and is levied upon property outside the United States, the plaintiff's reasoning is clear and simple. It is true that, if sound, it carries us farther than is necessary for a decision of this case, for apparently it would deny the right to tax so much of the income of a resident as comes from property located in foreign lands. One adverse criticism upon it is that it is clearly established that since the adoption of the sixteenth amendment, an income tax is never a direct tax. The effect of that change in the Constitution was to take a tax upon income derived from sources which had therefore made it a direct tax out of that category, and put it in the class of excises, duties, and imposts. *Brushaber* v. *Union Pacific R.R. Co.* (240 U.S. 1–19, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713; L.R.A. 1917D, 414; *Stanton* v. *Baltic Mining Co.* (240 U.S. 103–112, 36 Sup. Ct. 278, 60 L. Ed. 546) * * *."

To support further the conclusion that the income tax is not a direct tax, I wish to point out that the Supreme Court has applied the rule of uniformity to income taxes, which rule under the Constitution is limited to excises, duties, and imposts. This is brought out in the *Brushaber case*, already cited, and in the case of *Poe* v. *Seaborn* (282 U.S. 101), and in the case of *La Belle Iron Works* (273 U.S. 12). I do not believe that the cases of *Towne* v. *Eisner* (245 U.S. 418) and *Eisner* v. *Macomber* (252 U.S. 189) affect this conclusion. In those cases, the Supreme Court held that a stock dividend was not income. Since the sixteenth amendment relates only to income, that amendment could not affect a tax based upon something other than income.

COLIN F. STAM, *Counsel.*

BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, SEVENTY-THIRD CONGRESS, SECOND SESSION, H.R. 8396

MEMORANDUM SUBMITTED BY GEORGE DONWORTH, OF SEATTLE, WASH., IN REPLY TO MEMORANDUM, DATED MAY 21, 1934, OF MR. COLIN F. STAM, COUNSEL OF THE JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, ADDRESSED TO MR. PARKER

Mr. Stam's memorandum is in support of the conclusion that the Federal income tax is not a direct tax, and questions the proposition stated in my remarks made before this subcommittee on May 4, 1934, quoted in the memorandum.

I have examined the cases cited by Mr. Stam and I submit that they support, rather than deny, the proposition that the Federal income tax is a direct tax upon incomes, levyable only against the owner of the income.

As I read the cases cited by Mr. Stam, they hold that the income tax is not a direct tax on the property which is the source of the taxed income, but is a direct tax on the income itself. This distinction is made plain by the following quotation from *Brushaber* v. *Union P.R. Co.* (240 U.S. 1), one of the cases cited by Mr. Stam. In that case, in rejecting the contention that the criterion of the source of the income remains in the Constitution, notwithstanding the sixteenth amendment, the Court said, at page 19:

"Indeed, from another point of view, the amendment demonstrates that no such purpose was intended, and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. We say this because it is to be observed that although from the date of the Hylton case, because of statements made in the opinions in that case, it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the amendment contains nothing repudiating or challenging the ruling in the Pollock case that the word 'direct' had a broader significance, since it embraced also taxes levied directly on personal property because of its ownership, and therefore the amendment at least impliedly makes such wider significance a part of the Constitution—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby to take an income tax out of the class of excises, duties, and imposts, and place it in the class of direct taxes."

It is manifest that language could hardly be plainer in saying that the income tax is a "direct tax on the income."

In this Brushaber case, no one was claiming that an income tax could be assessed against a person not the owner of the income. The contention denied by the Court was the contention that the income-tax law was unconstitutional because it could be construed as a direct tax against the property from which the income arose.

The memorandum cites *Stanton v. Baltic Mining Co.* (240 U.S. 103), and *Tyee Realty Co.* v. *Anderson* (240 U.S. 115). These two cases do nothing more than to adopt the reasoning and conclusion of the Court in the case of *Brushaber* v. *Union Pacific* and add nothing new to the decision of the Court in that case.

The memorandum also cites *Cook* v. *Tait* (286 Fed. 409), a decision by the district judge sitting in the district court of Maryland. The memorandum states that the case was affirmed by the Supreme Court in *Cook* v. *Tait* (265 U.S. 47).

In the district court opinion there is a sentence which, considered alone, might lead at first blush to the inference drawn in the memorandum now commented upon, namely, the sentence reading: "One adverse criticism upon it (the contention that the income tax there in question was a direct tax levied upon property outside of the United States) is that it is clearly established that since the adoption of the sixteenth amendment an income tax is never a direct tax."

As authority for this statement, the opinion cites the case of *Brushaber* v. *Union Pacific R. Co.*, which, as shown above, held clearly that the income tax is "a direct tax on the income", but not a direct tax on the source from which the income is derived. That the district judge misunderstood the Brushaber case is apparent from the opinion of the Supreme Court in its review of the decision of the district judge in the same case. The opinion of the Supreme Court is found in *Cook v. Tait* (265 U.S. 47 et seq.), where the Supreme Court affirms the liability of the taxpayer on grounds entirely apart from the question of the directness of the tax. The Supreme Court, in deciding in favor of the liability of the taxpayer, makes no mention of the point of the directness of the tax (evidently because the point was not considered as involved).

The point involved in *Cook* v. *Tait* was whether the United States may impose a tax upon the income of one of its citizens, resident abroad, which income is derived from property located abroad at the place of his residence. The question, as stated by the Supreme Court, was as follows:

"The question in the case, and which was presented by the demurrer to the declaration, is, as expressed by plaintiff, whether Congress has power to impose a tax upon income received by a native citizen of the United States who, at the time the income was received, was permanently resident and domiciled in the city of Mexico, the income being from real and personal property located in Mexico."

In answering the question, the Supreme Court said:

"The taxing power of a State, it was decided, encountered at its borders the taxing power of other States and was limited by them. There was no such limitation, it was pointed out, upon the national power, and that the limitation upon the States affords, it was said, no ground for constructing a barrier around the United States, 'shutting that Government off from the exertion of powers which inherently belong to it by virtue of its sovereignty.'"

At a later point in the opinion, the court said:

"In other words, the principle was declared that the Government, by its very nature, benefits the citizen and his property, wherever found, and therefore has the power to make the benefit complete. Or, to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicil of the citizens, that being in or out of the United States, but upon the relation as citizen to the United States, and the relation of the latter to him as citizen."

By way of general comment in reply to Mr. Stam's memorandum, it should be stated that in all of the cases there cited upholding an income tax, the income tax was assessed against the owner of the income. Neither in the cases cited in the memorandum nor in any other case which has come to our attention has an income tax been upheld when asserted against any one other than one who was the owner of the income, or had been the owner and was a grantor of a defeasible interest, retaining an interest in himself, so that his status as the former owner was regarded as still continuing. And Ownership has always been determined by State laws.

It is submitted, therefore, that the authorities cited in the memorandum in no way contradict, qualify, or weaken the proposition stated by the undersigned and appearing in the Committee Hearings, Part 4, Unrevised Committee Print, dated May 4, 1934, pp. 97–98 and p. 109.

GEORGE DONWORTH,
Counsel for State of Washington taxpayers.

Mr. SHALLENBERGER. Mr. Treadway wants to present a statement to the committee.

STATEMENT OF HON. ALLEN T. TREADWAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS (AND THE RANKING MINORITY MEMBER OF THE COMMITTEE ON WAYS AND MEANS)

Mr. TREADWAY. Mr. Chairman and gentlemen of the subcommittee: Six weeks ago you began hearings on my bill relating to the taxation of community-property incomes. Because of the pressure of other business, the hearings have frequently been interrupted, and I believe the subcommittee has actually been able to hold but 8 half-day sessions during the time it has had this matter under consideration. Both the equities and the legal considerations have been exhaustively argued, and I do not believe that anything I or anyone else can say will contribute any further light upon the subject.

The arguments in favor of this proposed legislation have been ably presented by Mr. Parker and Mr. Stam, of the Joint Committee on Taxation; by Mr. Bartholow, representing the Treasury Department; and by the two representatives from the office of the Attorney General, Mr. Monarch and Miss Carloss. Likewise, the arguments in opposition have been ably presented by numerous counsel for taxpayers in the community-property States and by several Members of Congress from those States.

The hearings seem to have developed two issues: First, whether the proposed legislation would be fair to the community-property States, and second, whether it would be constitutional. It seems to me to be the province of the subcommittee, and indeed of the full committee and the Congress as well, to be concerned only with the first consideration, namely, the question of fairness. So far as constitutional questions are concerned, they can only be determined with authority by the Supreme Court of the United States.

If the testimony before the subcommittee were all to the effect that the bill was unconstitutional, there would be some justification for refusing to submit the question to the Supreme Court. Such, however, is not the case. Mr. Stam, the counsel for the Joint Committee on Taxation, has expressed the opinion, and has cited numerous cases to support his position, that there is a strong likelihood of the court upholding the proposed legislation. The Treasury Department is represented as having the same view, and so is the Department of Justice.

At page 25 of the hearings, Mr. Stam said:

> There are certain decisions of the Supreme Court which would give encouragement to the view that if we did put a specific provision in the statute taxing community income it might be upheld.

The Treasury Department's view is stated by Mr. Bartholow at page 49 of the hearings. He said:

> In the judgment of the Department, it is felt that the chances are in favor of the legislation being sustained.

Mr. Monarch, representing the Attorney General, expressed the view that the Supreme Court, in deciding the case of *Hoeper* v. *Wisconsin*, had made certain observations which would encourage the belief that the present bill, if enacted into law, would "escape the condemnation which was attached to the Wisconsin statute."

The General Counsel of the Bureau of Internal Revenue, in a letter to Mr. Parker dated December 15, 1933, and found at page 22 of the hearings, expressed the opinion that the language of certain decisions of the Supreme Court, which he quotes, "afford basis for the hope" that the court would uphold the proposed method of treatment of community incomes.

In view of these opinions by representatives of the Government, it seems to me there is sufficient ground for allowing the constitutional question to be presented to the Supreme Court for a clear cut decision on the issues involved. The precise question of the power of the Federal Government to tax community incomes in the manner proposed thus far has never been before the court. Therefore, all the discussion of this matter before the subcommittee has been purely academic. Until it is settled once and for all by the Supreme Court, it will be constantly agitated, and it might just as well be settled now as later.

If the contention of the opponents of this measure proves to be sound, and the legislation is found to be unconstitutional, taxpayers in the community property States have nothing to lose by its enactment. The General Counsel of the Bureau of Internal Revenue, in his letter to Mr. Parker to which I have already adverted, states that an expeditious testing of the constitutional question could be arranged to avoid any considerable tying up of taxes.

I might say in passing, that I have had one or two talks with Mr. Cochran, of your subcommittee, who has said that there was a suggestion of change of language in order to strengthen the constitutionality of the bill. I have not seen the suggested amendment, so I do not know the nature of it, but it has to do, of course, with the legal aspects of this question.

So far as the merits of the bill are concerned, I can only say that that it simply seeks to put taxpayers in all States upon an equal footing. Therefore, it is not a case of whether the bill is fair to the community-property States, but whether the existing situation is fair to taxpayers in the other 40 States.

The contention has been made during the hearings that inasmuch as the bill would apply to taxpayers in only eight States, it was inconsistent with the constitutional requirement of geographic uniformity. My answer to that is that the bill seeks to bring about geographic uniformity by removing the tax advantage that certain taxpayers now have by reason of their residence in certain States. It is manifestly unfair for a Massachusetts taxpayer with an income of $100,000 to be taxed $30,100 while the same income in one of the community-property States is taxed but $17,400. At the present time there is no such thing as geographic uniformity.

While I recognize that under the community-property system the wife is deemed to be the absolute owner of one-half the husband's income, yet this is purely a legal fiction, since the husband does not in fact turn over one-half his income to his wife. I recognize, also, that the community-property system had its origin in this country long before any income tax was imposed, and that therefore it cannot be said that it is simply a means for avoiding taxes. Nevertheless, it must be admitted that this system of property rights in fact operates to defeat the equal application of the Federal income tax.

I am not asking that the Federal Government set aside the property rights of individuals in the community-property States, but simply that the income tax be imposed in accordance with what Mr. Justice Cardozo has been pleased to call "the economic realities." It may be that the bill which I have introduced will not operate to carry out this purpose. If so, let it be amended, or let a new bill be prepared. I have no pride in authorship of the bill, but introduced it solely to get something before the committee for consideration. If the bill should be restricted to some extent, as suggested by the representative of the Department of Justice, that can easily be taken care of. Doubtless the present provisions of the bill would operate more harshly than is intended, although I wish to disclaim any purpose other than to bring about an equitable adjustment of what is at present an unfair situation.

There is one contention of those opposing this legislation that I want particularly to answer. It has been suggested that a husband living in a non-community-property State can obtain the advantage that those in community-property States have by transferring one-half of his property to his wife. This is not quite true. While it is possible to transfer investment property to the wife so that she will be taxable for the income, nevertheless the husband will have to pay a gift tax on the transfer if the property is of sufficient value. Moreover, in the case of salary income, the whole is taxable to the husband in spite of any agreement or instrument attempting to make the wife a part owner. In addition, the husband must pay a gift tax on the amount turned over to the wife.

I note that during the course of the hearing Mr. Parker revised his estimate of the probable revenue to be derived from the enactment of this bill. As I understand it, he is now of the opinion that it would increase the revenue by from $18,000,000 to $28,000,000, instead of $50,000,000 as at first suggested. From my viewpoint, it does not matter how much the bill would raise in the way of revenue.

The whole question, to me, is not one of increasing the revenue to the Treasury but of making each citizen pay his fair share of the taxes. I would be just as much for the bill if it produced only $1,000,000 as I would if it produced $100,000,000. Therefore, I do not regard the amount of revenue to be an important consideration.

In closing, may I express the hope that the subcommittee will speedily conclude the hearings and work out a bill which will meet the situation which those who are sponsoring this legislation seek to correct. As I have said, I have no pride of authorship in my own bill. No doubt it could be greatly improved. But what I do want to see is an equal distribution of the tax burden in accordance with ability to pay. No one can object to that, nor can anyone contend that it is fair to give taxpayers in the eight community-property States a tax advantage that may run as high as 42 percent in comparison with the amount paid in the other 40 States.

While I know it is late in the session to hope for the enactment of this proposed legislation, the subcommittee can perform a useful service by making its recommendation to the full committee before the end of the present Congress. In that way, your work will not be lost, and in the next Congress the full committee will be able to profit from your labors.

Mr. SHALLENBERGER. Thank you very much, Mr. Treadway.

Mr. HILL. Mr. Chairman, I should like to make a statement: On the question of submitting the matter to the court for a judicial decision, the gentleman from Massachusetts, I am sure, will recall that in the stock-dividend case, that decision was rendered by a divided court. It was a five-four decision. A great many people, including a very large minority of the Supreme Court itself, believed that a tax on stock dividends is permissible under the sixteenth amendment. But in view of the fact that the Supreme Court by a five-four decision held otherwise, the Ways and Means Committee, in charge of tax legislation, during the tenure of office of the gentleman from Massachusetts on this committee for a great number of years, has never for a moment questioned the fact that the law was settled on that question by that five-four decision.

Why wou d it not be just as consistent to say, in view of the decision of the Supreme Court to which I have referred, that the law is settled as to the community-property tax question, rather than submit it again to the court for a further decision?

Mr. TREADWAY. The gentleman from Washington knows that I am not a lawyer and of course the question that he is submitting to me——

Mr. HILL. I will make it a little more brief. In view of the close decision of the Supreme Court on the stock-dividends case, why has not the Ways and Means Committee during all the intervening years since that decision was rendered, felt that that question should again be submitted to the Supreme Court for decision?

Mr. TREADWAY. As I understand it, Mr. Hill, the decisions on which you are basing your contention that this matter has been before the Supreme Court, are not definitely admitted to have constituted an absolute show-down on that proposition; that is, on the direct proposition whether or not there is an unfair discrimination in favor of 8 as against 40 States. I have not studied the question and of course you are thoroughly familiar with the legal side of it.

Whether or not the Wisconsin case which you have cited to us so many times is absolutely parallel with the situation that we face here on this question of Federal taxation I am not competent to say. I would much rather take the unprejudiced judgment of men like yourself, who are lawyers, than to offer any opinion myself.

But, speaking as a man on the sidelines, so far as the legal end of it is concerned, it seems to me that there is a marked distinction between a case having to do with State taxation, coming to the Supreme Court on the question of constitutionality from the viewpoint of the State government, and a question which involves the relationship between 48 States and the equality of consideration given to the taxpayers of those 48 States.

As a matter of justice and fairness, I cannot see how it would be possible to claim on a technical decision concerning a State matter, that you can set up an absolute legal precedent for the relations between 48 States.

Of course, I am not competent to go into this thing from the legal standpoint. But simply from an individual's judgment, I cannot for the life of me see how a State decision can have any definite bearing on the attitude of the Supreme Court toward the relations between the 48 States.

That is the answer I would make. Of course, that may not be a correct legal answer. That is to say, I am not talking in terms of the court, I am not talking in legal language. I am only expressing Yankee sense; and I think that is Yankee sense.

Mr. HILL. Let me call your attention briefly, Mr. Treadway, to the Wisconsin case, the Hoeper case. That case went off on the proposition that the tax there was held illegal on the ground that it was in violation of the fourteenth article of the Constitution of the United States, which is the provision against taking property without due process of law. The question of ownership of the income was involved in that case. The State of Wisconsin endeavored to tax as the income of the husband, both his income and that of his wife, and the Supreme Court of the United States held that it was in violation of the fourteenth article of the Constitution. The provision of the fourteenth article of the Constitution of the United States is a prohibition against States taking property without due process of law.

The point was made in some other matters, that the fourteenth article did not apply to the United States Government, but only to States. But, in *Heiner* v. *Donnan*, another case decided by the Supreme Court of the United States, it was held that the fifth article of the Constitution of the United States had the same restrictive force as against the Federal Government as the fourteenth article has against State governments. So that question is directly involved there.

The gentleman from Massachusetts says that the question has never been before the court for decision. Of course, that is an opinion to which the gentleman is entitled, but it is only an opinion. I contend that it has been before the Supreme Court and settled by the Court. The testimony of the expert witness appearing here in behalf of this legislation as to the legality of this has only been an expression of a hope that the proposed legislation might be upheld by the Court. I think it is fair to say that every one of those witnesses recognized the fact that there is a doubt, a very serious doubt, as to the constitutionality of the proposed legislation.

Mr. TREADWAY. May I interrupt the gentleman there?

Mr. HILL. Yes.

Mr. TREADWAY. That brings up the interesting question whether we have not been passing legislation all during this session that, as it has been expressed on the floor, there was some question concerning its constitutionality as to a great deal of it.

Mr. HILL. That is true. But I called your attention in the early part of my remarks to the five-four decision on the stock-dividend question. There has always been doubt I think in the minds of the members of the Ways and Means Committee as to whether that decision is a correct interpretation of the law. And yet this committee has accepted that decision and has never endeavored to include stock dividends in the tax bill as an item for taxation, since that decision to which I have referred.

Mr. FREAR. May I ask the gentleman a question?

Mr. HILL. Yes.

Mr. FREAR. Is it not true that in the stock-dividends decision, which, as you say, was a five-four decision, it was specifically and

squarely on that very proposition? There was no question of uncertainty there. It was submitted as a proposition whether or not a stock dividend was income.

Mr. Hill. It was a question whether it was income; yes.

Mr. Frear. And that was decided squarely.

Mr. Treadway. If I may interrupt, Mr. Frear, that was Federal legislation.

Mr. Frear. Yes. It was decided squarely on that question in that case.

Mr. Hill. I am simply making the point that there was grave doubt in the minds of many members of this committee as to the soundness of that decision, and yet it has never been questioned by putting the matter up to the Court again for further decision.

Mr. Treadway. How could we question the majority decision of the Supreme Court, which is the last word in the matter of constitutionality.

Mr. Hill. I understand that, but the Supreme Court, of course, changes membership sometimes.

Mr. Treadway. Absolutely.

Mr. Hill. It might render a different decision at a different time. But we have never questioned it. We have let it go by. But when it comes to the community-property tax, then you say that we ought to put it up to the Court again.

Mr. Treadway. I still maintain that there has been no decision rendered by the Supreme Court squarely on the proposition of the community-property tax, as squarely as in your stock-dividends example.

Mr. Hill. Of course, as I say, that is a matter of opinion.

Mr. Treadway. That is quite true, and one opinion is as good as another, probably, on that point.

It is a fact, however, that Congress has never specifically legislated upon the subject of community property, and hence the Supreme Court has never had the opportunity to pass upon the power of Congress over it. The only Federal cases coming before the Court were those in which the Court held that Congress had based the liability for tax upon ownership of income, and not upon dominion and control.

Mr. Hill. Mr. Bartholow, in his appearance before the committee, representing the Treasury Department, was very careful in all of his statements to let it be known that his testimony on the question of the legality of this proposed legislation was not his individual opinion but that he was simply appearing in a representative capacity, to present the opinion of the Treasury Department.

Mr. Treadway. Mr. Hill, would any official ever be justified, appearing in behalf of a department, to do anything other than represent the Department's viewpoint rather than his own? We would not call a witness from a department to present his own views, unless he was given carte blanche by his superior officials so to do.

Mr. Hill. That happened in that case. I am not going to put anything in the record to embarrass Mr. Bartholow. But as a member of the subcommittee, the gentleman from Massachusetts, I think, is aware of the attitude of Mr. Bartholow himself personally and individually as a lawyer on this question.

Mr. Treadway. Well, his testimony is very plain. He was here in his official capacity, authorized to appear for the Treasury Department, and of course, he would represent the Treasury's views.

Mr. Hill. That is what he did represent and not his own views.

Mr. Treadway. Well, his own views would have no more weight than mine or anybody else's, as a witness. But he was here as an official of the Government.

Mr. Hill. He was here as a lawyer, and if he had sought to give his own legal opinion on it——

Mr. Treadway. But if he had, he would have had to sever his official position with the Department, of course.

Mr. Hill. I say he represented the Department's views and not his own views. That is the point that I am making.

Now, as to the question of putting the taxpayers on an equal footing, the question of the fairness of this legislation. If this legislation is enacted, the husbands and wives in community-property States as to community property and the incomes which under the State laws is community property prevented from exercising rights that husbands and wives can exercise in noncommunity-property States, to divide their property and make separate returns of the incomes from that divided property.

The suggestion was made that if the husband should give to his wife a certain part of his property, he would have to pay a gift tax. Thit is true if the gift amounted to more than $50,000. But gifts within $50,000 could be made, and probably 90 percent of the people of the country could avail themselves of such a division of property without paying a gift tax at all.

You talk about injustice. There is a situation where the injustice would be against the community-property States and in favor of the noncommunity-property States; because under the law, if this bill should be enacted, the husbands and wives in community-property States could not make that division and the entire income would have to be rendered by the husband and taxed to him.

Mr Frear. Will the gentleman yield?

Mr. Hill. I yield.

Mr. Frear. The suggestion occurs to me that it is true, as has been stated, that there is a $50,000 exemption. But suppose Congress provides that the exemption shall be $5,000, what then?

Mr. Treadway. That is very true. That is purely an arbitrary figure and can be changed tomorrow, if we wanted to change it.

Mr. Frear. In that case it would reach nearly all cases.

Mr. Hill. Of course, if you wanted to be entirely fair, leaving out of consideration the legal aspects of the question, you would enact legislation that would require the husband in all the States to render a return on the income of both husband and wife, to be taxed against him. If it is fairness and uniformity that you want, that is the course you would pursue, and that was practically the suggestion of the Treasury Department before our committee when we first took up the revenue bill. That suggestion was that the incomes of husbands and wives be put together in one sum and the tax calculated upon that total sum and then divide it according to the rights of the wives and the husbands in the income.

But if there were such absolute uniformity there would be just as much question as to the constitutionality of it as there is in connection with this proposed legislation here. But certainly, if you are looking for uniformity in taxation, that would be the course to pursue. That would be absolutely just and fair to all the 48 States.

But this legislation is a discrimination against the community property States and leaves 40 noncommunity property States the right to divide the income and divide the tax and thereby keep the tax in the lower surtax brackets.

I do not think I care to make any further observation on this. That sets out briefly the situation as I see it with reference to the matter of fairness and uniformity of this proposed legislation.

Mr. Frear. Mr. Chairman, I have heard the arguments of the very able attorneys who have appeared before the committee in reference to sustaining the community property tax as against a bill that has been presented by Mr. Treadway. I do not think any of them made a stronger argument or presented their case more thoroughly or more fully than did Mr. Hill on this committee. I said that without any hesitation, for he has taken every decision that has been rendered and has covered the case just as fully as any of them could have covered it. While it was very proper for these gentlemen to appear here before us, it seemed to me that he reached all of the particulars, just as he has this morning, in the brief statement that he has made. He understands the subject fully as well as any of them.

Here is a statement as to the justice or injustice that comes to my mind. It is contained in the record of the hearings before this committee. That is, that one member of this committee receiving $10,000 salary from the Federal Government pays $480 to the Treasury. Another member, under the community-property-tax laws—and there are several on the committee who come in that class—pays $300 to the Federal Treasury.

In other words, those who are in the noncommunity-property States pay $180 more to the Federal Treasury on the same amount of income received from the Federal Government than those from the community-property States. There is no question in anyone's mind but what there is an injustice existing somewhere, providing, of course, that the salary does go to the one who is rendering the service.

Mr. Treadway. Mr. Frear, is it not a fact that Mr. Hill's argument is based on a division of income and has nothing to do with the question of salaries? As I understand it, the salary should not be divided. In the community-property States the spouse does not control half the salary legally, does she?

Mr. Frear. Surely, she does.

Mr. Treadway. She cannot dispose of it as she can of income? Is there not a distinction between income and salary?

Mr. Frear. I believe not.

Mr. Hill. There is no distinction. It is all income. It is all community income.

Mr. Treadway. Does the wife control the salary of the husband to the same extent that she controls his income from investments?

Mr. Hill. She has the same right in the income that is in the form of salary as she has in the income that is in any other form. But so far as control is concerned, of course, in most of the community-property States, out of the necessities of the case, they have put the management usually in the husband. But there is no distinction, I will say, to be fair with the gentleman from Massachusetts, between income as salary and income as interest or proceeds from invested property in any form.

Mr. Treadway. Mr. Frear, I do not want to intrude further on your statement, but what you have just quoted from the hearings is extremely interesting. Is there an answer to it?

Mr. Frear. The answer is, of course, that the laws of the community-property States control in this case. That question has never been to the Supreme Court, I believe. I have studied practically all the cases.

Mr. Treadway. Here we have 25 men sitting on this committee and four of them came from community-property States. Those four pay $300 on their salary from the Government while you and I and the others pay $480.

Mr. Frear. That is right.

Mr. Treadway. There may be some answer to that, but I do not know what it is.

Mr. Hill. Let us see if there is not an answer. In the first place, the legal proposition is that under the State law——

Mr. Treadway. Now you are begging the question, Mr. Hill.

Mr. Hill. I am not begging the question. Under the State law, this community income, whether salary or otherwise, is one-half the wife's and one-half the husband's. That ownership is fixed by authority of the State law. If you take the salary by itself and segregate that, and consider nothing else in connection with this income-tax feature, it would certainly on the face of it and perhaps in the nature of it be an inequality. But here you have a noncommunity property State which permits the husband and wife to divide the property among themselves as they choose, and it is not only possible but it is entirely within the realm of probability that the husband might give to his wife a sufficient part of his property to overcome what would be the wife's interest in his salary in community property States, thereby equalizing the so-called injustice to which Mr. Frear has referred.

Mr. Treadway. But, Mr. Hill, you are setting up a hypothetical proposition. Mr. Frear—and I agree with him—is setting up a definite and positive proposition, pointing out the relationship between 21 men on this committee and 4 other men on the same committee, all of whom receive an identical salary from the Federal Government.

Mr. Hill. Just for purposes of illustration and not in any sense intending this as a statement of fact, I will assume that the gentleman from Massachusetts has an income of $100,000 a year. $10,000 of that is his salary as a Member of Congress. The remaining $90,000 is inome from investments in property. The gentleman from Massachusetts might make a gift to his wife of a sufficient amount of the income-bearing investments to make an equal division between

himself and his wife of the total income received by him. In that way he certainly would have the opportunity of presenting a divided report of income, so that in effect would he pay on one-half of his income and the wife on the other half, including the salary received from the Federal Government.

Mr. TREADWAY. That is a violent assumption. I would just like to say in answer to the last statement by Mr. Hill that he is making an argument on the basis that we men as law-makers will deliberately try to find an excuse for law-breaking. I know he did not mean that, but that is exactly what his statement would indicate.

Mr. HILL. Oh, no; I meant nothing of the kind.

Mr. TREADWAY. I know you did not.

Mr. HILL. I used that for illustrative purposes only.

Mr. TREADWAY. That is, of course, what it would lead to.

Mr. HILL. But I do not think the gentleman would deny that there are cases, not considering the cases of Members of Congress, where this division has been made and is being made for the purpose of keeping the incomes out of the high surtax brackets.

Mr. FREAR. May I say that that very suggestion appears in a statement of a representative of the Treasury Department where they say that:

In the most notorious recent case, the jury acquitted the husband from a criminal charge in such a situation. The income taxes which the husband sought to avoid in this manner, amounted to over $1,000,000.

That was in a case, as you remember, disclosed by a Senate committee, in which this person sought, by transfer to the wife, to avoid the payment of tax.

Let me say that my State has attempted to reach this situation and perhaps I am subject to the criticism of failing to present the State's attitude and the attitude of the Supreme Court of my State.

This statement therefore continues (quoting the Treasury Department statement):

The Treasury Department therefore recommends that the committee consider whether a husband and wife living together should not be required to file a single joint return, each to pay the tax attributable to his share of the income. Such a provision has long been in force in other countries.

It speaks particularly of the *Wisconsin case* and says:

Reference may be made in this connection to the Hoeper case (284 U.S. 206) in which the Supreme Court held that a somewhat similar provision in the Wisconsin income-tax statute was invalid. The case is not, however, conclusive for two reasons. In the first place, the Wisconsin law was evidently interpreted by the court as requiring that the husband should pay the tax on his wife's income. This objection can be eliminated by proper draftsmanship specifying otherwise. In the second place, the Federal Government is not under the same constitutional restrictions as the States in this respect.

They continue as follows:

Our estimates indicate that, on the present rates, the suggested change would directly account for an additional $40,000,000 of revenue, besides discouraging innumerable colorable transactions and eliminating present inequities.

Now, I have listened very attentively during these hearings and I cannot see that in any of the cases they have touched on the specific proposition of the injustice that is worked by this discrimination.

Of course, the gentleman refers to the decision in the stock-dividends case. I agree with the gentleman that perhaps the decision was an improper one. There was a 5 to 4 decision, as he states. You could take the personality of the court then and almost tell what the decision was going to be and give the reasons for it, largely due to their training and their line of thought. You could predict what the report would be. That is, Justices Brandeis and Holmes and others were in favor at that time of taxing stock dividends, while on the other hand, it was almost the same recognized personality that appeared in the original report declaring the income tax unconstitutional, that appeared in that report, and we had to provide for a constitutional amendment for that purpose.

But we have held that a majority even of one of the Supreme Court is a majority and that majority set aside the opinion of both Houses of Congress, which opinion was certified to by the President of the United States, after getting the opinion of the Attorney General.

But when a decision has been rendered by the court, we are bound by it.

Of course, today no question is raised about stock dividends, because there are no stock dividends. That is out of the picture.

In the Wisconsin case they went beyond where it seems they had the right to go in their effort to hold the law valid, in holding that the property of the wife, no matter from what source received, should be taxed. That is one of the points made; and the other is that the Federal Government is not under the constitutional restriction.

Mr. HILL. If I may say just another word, Mr. Chairman. In that report, or rather in the view expressed by the Treasury Department in that report to which the gentleman from Wisconsin referred, the Treasury Department had in mind the drafting of a provision which would apply to husband and wife in all of the 48 States. The concrete suggestion made in that regard was that they might take the income of the wife and add it to the income of the husband and calculate the tax upon the total of the two, and then divide the tax proportionately according to the interest of each, to the husband and the wife. That certainly would be uniformity.

The Treasury Department at that time was not contemplating singling out these community-property States and saying:

We are going to adopt one rule of taxation as to the husbands and wives in those 8 community-property States and leave the husbands and wives as taxpayers in the other 40 States under the present taxing provisions.

The second proposition that I want again to call attention to is that the Treasury Department in that statement overlooked the fact that the fifth article of the Constitution of the United States has the same restrictive powers over the Federal Government against taking property without due process of law that the fourteenth article has over the States against taking property without due process of law. So they simply carelessly made that statement, because the Federal Government is under the same handicap as to taking property without due process of law as are the States. They just simply overlooked that one point.

Mr. Frear. May I suggest this? The Federal Government does not attempt to take the property away. Let me quote from this same Treasury statement. It says as follows:

> Eight of the 48 States have community-property laws, which, under the present income-tax law, have been held to permit each spouse to report one-half of the community income, although it was all earned by, and was expended under the control of, the husband. This situation not only results in a large loss of revenue to the United States, but also operates most inequitably as between spouses in community- and those in noncommunity-property States. Thus a husband earning a salary of $25,000 in New York will pay approximately $2,520 in income taxes, whereas a husband earning the same salary in California may throw one-half of it into his wife's return, the two paying a total of only $1,470 in income taxes.

So that apparently all of that has been considered by the Treasury Department.

I want to refer to this report of Mr. Parker's which I think is very complete. He also takes up the estate tax. I will not discuss that at this moment, but——

Mr. Treadway. In connection with that other matter, Mr. Frear, the item that you read was, of course, a very definite refutation of Mr. Hill's position that the Treasury Department had overlooked that point.

Mr. Frear. They had considered especially the eight community-property States.

Now, Mr. Parker makes clear, on page 17 of these first hearings on this community-property question, on the question of the estate tax the advantage enjoyed by husband and wife with substantial property in a community-property State. There is inserted a table which shows on a million dollars of property accumulated by the husband, the estate tax in the non-community-property States is $117,500, while in the community-property State it is $85,000, a difference of 38 percent.

I do not care to go into any other detail, Mr. Chairman. I wanted to speak particularly of the Wisconsin case because I know in that case what the disposition of the court was as well as the legislature.

Mr. Treadway. If I may be allowed, Mr. Chairman, I would like to add just one observation in reference to the suggestion made by Mr. Hill about this $100,000 income. Let us take out the $10,000 salary he received as a member. That leaves $90,000 of income. In order to provide his wife with an income of $90,000, it would be necessary to give her $1,500,000 in property, on which the gift tax would be $241,240. So that in setting up an income of $90,000, the Government is getting a pretty good return—$241,000. I believe those figures are accurate.

So far as I am concerned, I have nothing further to say, Mr. Chairman.

Mr. Shallenberger. We thank you for the information you have given the comittee.

Mr. Cochran of Pennsylvania spoke to me about this matter and suggested he was going to offer an amendment to this bill, but he is unavoidably absent.

Mr. Treadway. He told me he could not be here today.

Mr. Shallenberger. So that we cannot take any action on that today.

Mr. Frear. When this matter was up originally I think at least a dozen Members of the House said that they would be very glad to appear before the committee.

Mr. Shallenberger. The clerk of the committee has notified me that these Members were given notice of the hearing and evidently they have not been able to attend.

Mr. Treadway. Of course, it is a difficult time for men to come over, they are so busy in the closing hours of the session.

Mr. Shallenberger. I shall leave the hearings open for 1 other day. We will conclude our hearings tomorrow. I will set the time at 10 o'clock in the morning and we will hear anyone who desires to come before the committee at that time.

(Whereupon the committee recessed until Wednesday, June 13, 1934, at 10 a.m.)

COMMUNITY PROPERTY INCOME

WEDNESDAY, JUNE 13, 1934

House of Representatives,
Subcommittee of the Committee on Ways and Means,
Washington, D.C.

The subcommittee met at 10 a.m., Hon. A. C. Shallenberger (chairman) presiding.

Mr. Shallenberger. The committee will be in order. Mrs. Kahn, of California, would like to make a short statement.

STATEMENT OF HON. FLORENCE KAHN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. Kahn. Mr. Chairman and gentlemen, I am not a lawyer, neither am I an expert on ownership or taxation. But I do speak as one of the women living in a community-property State, who realizes the tremendous benefit of these laws to the women and children in that State, the sense of security it gives the mother and the feeling of real partnership as half owner in all common property it gives the wife, that the women in other States do not possess. I know that this is a tremendous advantage to the women of these community-property States.

It seems to me it would be far wiser and more progressive to urge those States that have no community property laws to enact them rather than to discourage and handicap those that have.

Why penalize the States that are wise enough to protect their women and children? Yes; I realize it is a matter of dollars and cents; taxes will be reduced. But there are some things worth more than dollars and cents, and this feeling of real partnership, this knowledge of protection and security to the home are among those.

If then this property is the woman's in fact, let her carry all the duties and take upon herself the burdens that go with it. In community-property States we do according to law, without subterfuge and above board, what is done in other States to beat the law by transfer of property, false sales and evasions.

Of course, I want to register my decided opposition to the enactment of this legislation.

Thank you very much, gentlemen.

STATEMENT OF HON. RILEY J. WILSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. Wilson. Mr. Chairman and gentlemen of the committee, I appreciate the privilege of appearing before the committee and having the opportunity of submitting on behalf of my colleagues from

Louisiana a joint statement in opposition to H.R. 8396, having for its purpose the taxation of community-property incomes. This simply means that husband and wife in States with community-property laws shall be denied the right of filing separate returns, and in disregard of fundamental State laws regarding the ownership of property.

The State of Louisiana with seven other States, namely, Texas, Arizona, New Mexico, Idaho, Nevada, Washington, and California, have community-property laws wherein the wife is a partner in the community and is vested with real ownership of one-half of all the community property and income therefrom, and, accordingly, files a separate return for her income on one-half of the property. This was the law in Louisiana many years prior to any legislation levying the income taxes, and is still the law.

Congress has previously attempted to set aside the constitutional rights of taxpayers in these community-property States by forcing the husband and wife to file one income-tax return; however, due to the apparent unfairness, these efforts proved futile. This right of the husband and wife to make separate return of community-partnership income has been attacked in court; in fact, carried to the Supreme Court of the United States, with the result that that court sustained the rights of husband and wife in community partnership to report separate returns. So the question is not new.

We will not attempt to discuss the constitutional aspect of the question for the reason that this has been ably presented by eminent attorneys; however, we will say a word about the inequity of the proposed legislation:

First. It is a discrimination against State rights, as it is an attempt to force the husband and wife in Louisiana, who, under our local law, are in fact real partners, to report all the community-partnership income in the name of the husband alone, when, as a matter of law and fact, the husband owns only one-half of the community income, and is merely the managing partner of his wife's half. There is no question about the definite ownership of community property and the income therefrom in the State of Louisiana, as the wife is the distinct owner of one half and the husband the other half.

Second. This will not produce uniformity, but, on the contrary, will unfairly discriminate against Louisiana and other community-property States, and will ignore the fundamental law of our State, by treating what, in Louisiana, is in substance a partnership created by law, differently from voluntary partnerships in every common-law State. The proposed bill requires the husband, who is analogous to a managing partner at common law to include in his individual income-tax return, not only his share of the partnership income, but the share which belongs to his wife as a partner in a community partnership. This means that for taxation purposes the community partnership in eight States is to be treated differently from ordinary partnerships in the common-law States of the Union, notwithstanding the fact that the community partnership is compelled by law in Louisiana, while in the common-law States it can be effected through agreements.

Three. In community-property States the husband is the manager and administrator of this partnership, and this bill proposes, notwithstanding lack of ownership, to tax the spouse on the entire community interest, although the husband is admittedly not the owner. In common-law States the managing partner of a partnership is not required by the Federal revenue act to include in his individual income-tax return the share of the partnership income belonging to his other partner or partners.

Fourth. It also interferes with the legal business set-ups prescribing reports that are not in keeping with the State laws, and, further, it does not involve a great amount of increased revenue.

If it is the purpose of this legislation to obtain all the income that is possible and at the same time enact laws that will be fair and uniform in their application which will not disregard State laws and practices, then it would appear to us that one return from the head of the family in every State of the Union should be established and not penalize 8 States by a discriminatory bill which does not apply to the other 40 States. As it is now, there are those States with common laws where many separate returns are filed due to gifts from one spouse to the other, for the very purpose of permitting separate returns.

If it is the desire of Congress to go into this matter in a thorough and equitable way, it would appear to us that a law compelling one spouse to file one return for both in every State of the Union would be along more equitable lines—but even in this the husbands and wives would be considered as discriminated against in favor of single persons—but it would be more equitable than the provisions of the proposed bill.

We appreciate very much the attention the committee is giving this matter and we realize that the question is highly technical and is very much misunderstood by those not familiar with it, as has been evidenced before, and, therefore, respectfully request that a most careful consideration be given our plea as it would be a great injustice to citizens of our State to have this law adopted and disregard our community property laws and compel one spouse to pay an income on property that he does not legally own.

J. O. Fernandez, Member of Congress, First Congressional District; Paul H. Maloney, Member of Congress, Second Congressional District; Numa F. Montet, Member of Congress, Third Congressional District; John N. Sandlin, Member of Congress, Fourth Congressional District; Riley J. Wilson, Member of Congress, Fifth Congressional District; René L. DeRouen, Member of Congress, Seventh Congressional District; Cleveland Dear, Member of Congress, Eighth Congressional District; J. Y. Sanders, Member of Congress, Sixth Congressional District.

STATEMENT OF HON. MORGAN G. SANDERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS AND A MEMBER OF THE WAYS AND MEANS COMMITTEE

Mr. Chairman and members of the subcommittee, you gentlemen well know my views on this proposed legislation, H.R. 8396, the Treadway bill, which effects those States having community-prop-

erty laws, and briefly I wish to call your attention to some pertinent facts. Pursuant to House Resolution 183, passed June 9, 1933, a subcommittee was appointed to consider means of improving and simplifying the laws with reference to preventing the evasion and avoidance of the internal-revenue laws. That committee was composed of the following members of the Ways and Means Committee: Samuel B. Hill, of Washington, chairman; Thomas H. Cullen, of New York; Fred M. Vinson, of Kentucky; Jere Cooper, of Tennessee; Allen T. Treadway, of Massachusetts; Frank Crowther, of New York, and James A. Frear, of Wisconsin. That committee made an exhaustive study of the tax question and submitted their report and are to be congratulated therefor. That committee made no recommendation as to "community-property income." That committee made the following report on that question or proposition:

The income-tax situation existing in 8 States of the Union having community-property laws has been carefully considered. No recommendation in regard thereto is made by your subcommittee in view of the legal difficulties involved.

That was an able subcommittee, and they realized that there were "legal difficulties involved."

When the Ways and Means Committee convened on the first Monday in December last to consider the report of the subcommittee and to frame a revenue bill, there was an attempt to write into said bill a provision, the effect of which was to change the law so as to affect the 8 community-property States, and on my motion it was finally stricken from the revenue bill. During the course of the hearings on that bill there was incorporated into that record by various members of the committee decisions of the Supreme Court bearing upon that question. Those decisions were as follows: *Poe* v. *Seaborn*, a Washington case, found in 282 United States Reports. Also the following cases: *Hoeper* v. *The Tax Commission of Wisconsin* (284 U.S. 208); *Knowlton* v. *Moore* (178 U.S. 41, 77), a Texas case; *Hopkins, Collector of Internal Revenue*, v. *Bacon* (vol. 282 U.S. Supreme Court Reports, p. 122), and cases therein cited; a California case, *United States* v. *Malcom* (282 U.S. 792). It is not necessary to mention other cases cited during the hearings of the full committee on the revenue bill, but I do wish to reiterate that the able subcommittee made no recommendation on account of the "legal difficulties involved," and the final action of the full committee did not include the community-property question in the revenue bill. The hearings before this honorable subcommittee have been extensive, and all of the points, legal and otherwise, have been covered by able witnesses.

Under our dual form of government each State has the right and the authority to fix its own laws and its own property rights, and these laws and these property rights will not be disturbed by the Supreme Court of the United States provided they do not conflict with the Constitution of the United States, which is the supreme law of our land. These decisions may go over the heads of some folks who do not have proper reverence for our Constitution and our laws. If this Congress should pass a bill interfering with the right of eight sovereign States of this Union to fix their own property rights when those rights are not in conflict with the Constitution

of the United States, then I have no doubt but what the Supreme Court of the United States will write such doubting Thomases another letter in addition to those which I have given.

I am aware that to the person who has not given study to this very important problem that at first blush it might occur to him that the community-property States have some advantages over those States which do not have community-property laws. However, when you take into consideration the fact that the laws in the community-property States absolutely fix the status of community-property rights between the husband and the wife and that they have little opportunity or power by subterfuge to escape their just proportion of taxation, and when you consider the different laws of the 40 States which are not community-property States, and the powers and possibilities which the citizens of those States have under their own peculiar laws for tax evasion, it occurs to me that the eight community-property States would be at a disadvantage if denied their rights under their own constitution and laws. A few of these evasions are accomplished through transfers of properties from husband to wife or wife to husband, by allocations of charitable gifts, by exchanges of security holdings, and by trusts, voluntarily created. These evasions are more difficult in Texas and at least some of the other community-property States because of stringent legal restrictions fixed by statutes of these States.

Mr. Shallenberger. Mr. Lemke, of North Dakota, wants to make a short statement. Mr. Lemke, we shall be glad to hear you.

STATEMENT OF HON. WILLIAM LEMKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Mr. Lemke. Mr. Chairman and gentlemen of the committee, for the record, I am a Member of Congress at large from North Dakota, otherwise occupied as attorney at law.

Mr. Cochran. Mr. Lemke, is it not a fact that you were attorney general of the State of North Dakota?

Mr. Lemke. Yes; I have been attorney general of the State of North Dakota. I have been interested in the agricultural movements and in fact have been connected with every agricultural movement in the Northwest in times past, and at one time was a member of the national executive committee of the Nonpartisan League, that had a large membership in 13 States.

Mr. Shallenberger. We are glad to hear from you on this bill, Mr. Lemke.

Mr. Lemke. I wish to state first that I am not opposed to the community-property law. I think that women have the same rights to hold property as have men.

I do not believe, however, that this should be used by the States and by the inhabitants of the States that have the law as a means to dodge taxes and thereby have their just share or burden of the taxes carried by the families of other States.

The question of the constitutionality of the proposed legislation here under consideration has been brought up, but I am perfectly willing to trust the Supreme Court of the United States with that question and I am confident that that Court will not permit these eight States that have these community-property laws to escape

their just burden of taxation by setting up a constitutional objection. Because the greater purpose of our Constitution and the decisions of our Supreme Court, I think, has been that all people under similar conditions be treated equally.

So that I shall not discuss that part of the bill, because I am satisfied that if there is any question of constitutionality in it, the committee in less than 5 minutes can remove that barrier and come down to the question of just taxation and equal taxation of all of the people, wherever they live.

I can see no reason why a family living in California as husband and wife and raising children, should be allowed to so manipulate property among themselves that they should pay a lower rate of taxation than a family in similar circumstances living in North Dakota.

I have received briefs on this subject from attorneys general and others in States where they have the community-property system and I want to say to their credit, when I brought up this issue and asked them whether their people wished to dodge their just proportion of taxes, they denied that that was their object. But they did say that they believed in the community-property law. And so do I. But I am satisfied that this proposed bill can be changed in 5 minutes so that they cannot dodge their taxes.

That is what I am interested in. That is what the people in the other States are interested in, outside of these eight States. I am sure that when it comes down to the point of putting all camouflage and pretense aside, the people themselves—not their official representatives, perhaps, or their attorneys, but the people themselves—in those States will not ask that privilege. In fact, I think they have dodged their just proportion of taxes long enough. There should be a halt called to it. I am satisfied that this Congress has the power to call a halt to it, and I am quite satisfied that the Supreme Court of the United States will sustain any bill that has that for its object and purpose.

I thank you, gentlemen.

Mr. Hill. I should like to ask you a question. Mr. Lemke, you used the expression "dodging taxes."

Mr. Lemke. Yes.

Mr. Hill. And also the expression, "manipulations between husband and wife in community-property States to dodge their just proportion of taxes."

Mr. Lemke. Yes.

Mr. Hill. You recognize, do you not, that in all of these eight community-property States, the system of community property was adopted long before there was any sixteenth amendment and long before there was any income-tax legislation on the Federal statute books?

Mr. Lemke. Yes; but what has that to do with it? I also realize that they pay about $50,000,000 less in taxes because of that system, and I am sure that those families themselves if they were asked as a whole—I mean the majority of them, though perhaps not all of them—would be willing to pay their just proportion of the taxes.

Mr. Hill. You understand that they are relieved of $50,000,000 of taxes. Of course, you got that impression from statements or estimates presented heretofore to this committee by Mr. Parker who is the chief of staff of the Joint Committee on Internal Revenue Taxation.

Mr. Lemke. Yes; largely.

Mr. Hill. Mr. Parker has since that time revised that estimate downward to about $20,000,000 or $18,000,000, as I recall it.

The expression, dodging taxes, is rather a harsh term to be applied, in view of the fact that these community-property systems were in force long years before there was any income-tax law on the statute books of the Federal Government. Certainly you would not contend that they adopted these community-property systems for the purpose of evading taxes or dodging taxes, as you call it, because there was not any occasion for anything like that at the time these systems were adopted; there was no such tax to dodge.

Mr. Lemke. But they are undoubtedly doing it, or else this question would not be up. Whenever you get out from paying your just proportion of taxes, in comparison with people in similar situations, you are dodging your taxes.

Mr. Hill. Let us see about that. These eight States are sovereign States of the Union, just the same as the noncommunity-property States are sovereign States. How can you say that these 8 States, adopting a certain system of property laws, are dodging taxes, while the 40 other States, who have the same opportunity to enact property laws are not dodging taxes?

Mr. Lemke. You are confusing the issue, I am afraid. I am not saying that those States intended to do that, or that that was their object when they passed these community-property laws. I stated a moment ago that I believe in that principle. But the result is that the inhabitants there are paying less in taxes, and therefore are dodging by that much their just proportion of the taxes, whether it is $50,000,000 or $18,000,000. They are not contributing their just proportion of taxes, living under similar conditions of other families elsewhere.

Whatever the object was of the community-property law—and I think it was laudable—the time has come when they should not be here fighting this law which has for its object the equal taxation of its citizens with others.

Mr. Hill. If they are paying taxes according to ownership of incomes in those States as determined by those States, you could hardly say that they are dodging taxes?

Mr. Lemke. This is a Federal question, not a State question. Under the Federal law they are dodging taxes whenever they do not pay them in equal amounts under similar situations with the rest of us.

I am sure the Congressman would not object to paying the same amount of tax, if he has the same income, as I do. I am talking about Federal taxes. We are all partaking equally of the protection that the Federal Government gives us and the benefits that extend to us. Therefore, I think that under similar conditions if you are able to do so, you ought to pay the same tax as I do, or, conversely, I ought to pay the same tax as you do.

Mr. Hill. Let me ask you this question: What justification is there for demanding that these 8 States change the basis of their

ownership of property as a basis for tax payments, instead of having the other 40 States change their basis of ownership of property as a basis for the payment of taxes?

Mr. LEMKE. I am agreed with you that there is no justification except this: I am satisfied that a law can be drafted that does not require that and that this committee, if it gets down to business, can do it in 10 or 15 minutes.

Mr. HILL. Will you suggest to us what that ought to be?

Mr. LEMKE. That law would tax, according to the family relationship, the joint property of those who live as husband and wife or families together.

Mr. HILL. That would not be confined to the eight community-property States, would it?

Mr. LEMKE. No; but it would hit those eight States with the rest.

Mr. HILL. And it would hit the other 40 non-community-property States, would it not?

Mr. LEMKE. Yes; and it should.

Mr. HILL. Now, Mr. Lemke, that is not the proposition here; that is not the proposal here that we are considering. That is the proposal that the Secretary of the Treasury made to this committee when we were discussing the general revenue bill. So that if you are going to make it uniform you ought to make it apply to the family relationships in all the 48 States and not confine it to families in only 8 of the 48 States.

Mr. LEMKE. I am willing to admit that, and that would be my way of handling it. As a matter of fact, when this bill came up on the floor, we were told that it would be taken care of in another bill. Why the committee has not done that, I do not know. I think there is still time and the committee can and ought to do it.

Mr. HILL. That proposition was before our committee in the general revenue bill and was submitted to the committee by me as a substitute for this particular character of legislation now proposed. Many of the members of the committee who are supporting the legislation now before the committee voted against that proposal, so that it went out.

It rather indicated to me that it is not uniformity in the payment of taxes that they want, but that they want simply to put the eight community-property States in a strait-jacket and make taxes payable according to the family income; whereas in the other 40 non-community-property States they propose to let the wife and the husband file separate returns according to their ownership of income. That is exactly the situation we have here. I believe from what you say that you do not subscribe to that kind of proposal.

Mr. LEMKE. I would suggest that I am in favor of uniformity of taxation; that each family, wherever they live, be treated alike. It seems to me that the committee could very readily bring out such a bill.

Of course I realize, as you realize, that I cannot be and have not always been very successful in enforcing my own individual ideas in the matter of legislation. When I prepare a bill that I think is perfect, the committee may alter or change it. That is their privilege. Then they may report it. To my mind, as a rule they spoil it. But the fact remains that they have the right to change it. That is our system of government. We must all give and take.

As I say, I am not here to ask that the community laws be changed. I think the wife should have her share of interest in the husband's property. But I feel that they should be taxed alike, whether they live in a community-property State or another, so far as Federal taxes are concerned.

Mr. HILL. As I gather it from your statement you believe that that should apply to the entire 48 States and not simply to 8 States of the Union.

Mr. LEMKE. It should apply to all. No State should be allowed to say that their families shall pay less, under the same conditions, than any other. It should apply to all of them. Justice would demand that.

Mr. HILL. Certainly that proposition is a fair one. There is not any question about that. If you make it applicable to the family incomes in the 48 States, that is fair. But when you say that in 8 of these States that happen to have the community-property system you must place the joint income of the family in one return and pay taxes upon it while at the same time permitting the family income in the other 40 non-community-property States to be divided according to ownership between the husband and wife, then you are not getting the uniformity that you have advocated here.

Mr. LEMKE. That is correct. Since this question has arisen, let me ask you this: Could you not, by a very few words, make this law applicable to all of the family incomes of the Nation, and get that uniformity?

Mr. HILL. You can do that so far as Congress is concerned, if the committee would do it. But they do not propose to do that thing. I think it would be fair.

I think there is serious question about the legality of it, just as I do about the legality of this proposed legislation. But that question aside, certainly your proposition is a fair one and I cannot see how anybody could object to it from the standpoint of fairness and equity.

But that is not what is proposed in this legislation. I know that you are a lawyer and a good lawyer. I know what your reputation is in the law.

Mr. LEMKE. Thank you for the compliment. My enemies do not always admit that.

Mr. HILL. All of the 40 States that we call non-community-property States are otherwise designated as common-law States.

You recognize, of course, that under the old common-law rule, when a woman married a man and brought property into that marital relationship, that property, both real and personal, and all of the income from it, belonged absolutely to the husband. In the course of years the common-law States have liberalized these laws so that the rights of the wives have been recognized as to property and now I presume in all of them the wife can hold property in her own right, just as can the husband, and the marital relationship itself does not divest her of any property that she might have before marriage, or may acquire after marriage.

So that on the question of whether you are dodging taxes or not, you might say that in the 40 non-community-property States they have manipulated things, if you want to use that word, so that the

effect is that the husband and wife can divide the income of the family and thereby escape the payment of as much taxes as they would have to pay if that income were all in one lump sum and returned by the husband alone.

That is the situation that you have. The fact is that in all of these 40 States the husband and the wife do make separate returns where they have separate incomes based upon their ownership of the property.

In this legislation it is proposed to deprive the husband and the wife of that right to make separate returns based upon the separate ownership of the property, in these eight community-property States.

Mr. LEMKE. Of course, there is a difference there. For instance, in your State, the property that the husband holds and has in his own name is supposed half of it to belong to his wife. At least after he dies. I have had that much experience with your community-property law. I do not know how it is before. Consequently, those living in the other 40 States might say, "Let us make it exactly alike and say that this property that is in the husband's name is already being assessed as the husband's property, separate and distinct, while in your State it is divided equally." Nevertheless, I favor absolute equality, and I think that this committee can work out a bill that will bring about uniformity in all States.

Mr. HILL. I understand that your idea of what would bring about that uniformity would be legislation that would apply to all of the 48 States, so that the family income in each of the 48 States would be assessed in one lump sum for taxation purposes.

Mr. LEMKE. It seems to me that would be better.

Mr. COCHRAN. By family income, would you include the income of minor children, or just the income of the husband and wife?

Mr. HILL. I had in mind the husband and wife.

Mr. LEMKE. That is the question here, is it not—the question of the husband and wife?

Mr. HILL. That is what community property means specifically, yes. That is all I have to ask, Mr. Lemke.

Mr. COCHRAN. Mr. Lemke, the gentleman from Washington and you are both Members of Congress. The gentleman from Washington lives in a community-property State and you live in a noncommunity-property State, your base salary being $10,000 a year, and we will assume now that neither of you has any other income. Under the tax law of 1934 you would have to pay upon your salary $300 a year. The gentleman from Washington, both he and his wife together, would pay $80 on his salary.

Can you reconcile the justness of that?

Mr. HILL. Do you mean a total of $80?

Mr. COCHRAN. Yes.

Mr. HILL. That certainly does not comport with the fact. I do not know how you figure it out, but I know I paid more taxes than that.

Mr. COCHRAN. I said under the tax law of 1934. You have paid none yet under that law. I take my figures from a copy of the tax law of 1934 and I know they are absolutely correct.

Mr. HILL. I am not questioning your calculation. The only thing I have in mind is this: I remember that my tax payment for last year was something over $300 for both myself and my wife.

Mr. COCHRAN. That is under the 1933 tax law now superseded by the 1934 tax law.

Mr. FREAR. And at that time Mr. Cochran and I paid $480 on the same salary.

Mr. LEMKE. My answer to that is that that looks absolutely unjust and should be remedied and I hope this committee will do that before it gets through.

It seems to me that you can give other instances, just as glaring, to show the injustice of this system. While in my own case I am not complaining of it, at the same time I am representing, as we all are, not only my own and your own districts, but all the people of the Nation. I feel that there should be equality, especially in the levying of Federal taxes, upon all the people in similar situations. I do not think anybody can object to that.

Mr. COCHRAN. I want to add to the observation made by the gentleman from Washington as to the amount of the tax payable on a Congressman's salary, that I did not include the normal tax, because the normal tax would not be affected. The figures that I gave were based upon surtaxes.

Mr. FREAR. The bill that is before us—and not some bill that has been before us heretofore, but the bill that is now before us—is H.R. 8396, introduced by Mr. Treadway. It says:

> That for the purpose of determining the income-tax liability of any individual during any taxable year beginning after December 31, 1933, property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse who has the management and control thereof under the law of the jurisdiction in which the marital community exists, and such spouse shall alone be entitled to the deductions and credits allowed under the internal-revenue laws, which are properly allocable to such property or income.

The purpose of that language "who has the management and control thereof" is to compel a joint return. But where the wife has an independent income which she receives from some other source, not through her husband or through this community property, of course, she has independent rights thereto. That is her estate.

Now, Wisconsin, under a decision which has been quoted here frequently, included the wife's separate income, which she got from other sources than the husband, and the Supreme Court of the United States held that that could not be done, although the Supreme Court of the State had sustained that. The Supreme Court of the United States said that it could not be done because the wife's separate income, separate from the income she got from her husband, was something that ought to be taxable to her independently.

This proposition is that where the husband has the management and control of the property and ordinarily exercises it, there shall be one return and that is what we do in all of the other 40 States. We attempt to do it. Of course, as the Treasury reports disclose, it is for the purpose of curing an attempt by husbands to transfer property to their wives so as to bring them under the effect of the community property States.

Mr. HILL. I beg the gentleman's pardon. This is fixed by statute.

Mr. FREAR. I agree with you. I say, there was this fraudulent attempt, for instance in New York, to bring themselves within the effect of the community-property-State laws. That was their pur-

pose. There is no question as to the community-property States themselves having laws that are legitimate but for Federal tax purposes the bill makes a joint return in cases so provided.

That *Wisconsin case* has been quoted frequently because my State has gone to the opposite extreme. But the purpose is to make the husband who practically handles all of the income and who has charge of it, responsible for the payment of the taxes, instead of saying that it may be divided up so that the Federal tax can be reduced. Of course, as to the State tax, that is decided on the income tax law of the State. But this is a Federal income tax, which, as you say, we are all supposed equally to contribute.

I do not care to discuss the merits of the bill, but the proposition presented to the committee is whether or not it shall be taken to the Supreme Court to decide whether this proposal is constitutional and, if so, the husband and wife shall make a joint return except as to her independent property, which she gets separate and apart from her husband.

Mr. Lemke. May I suggest right there that this bill should contain the further words, "for the purpose of the Federal Revenue Act only"? I do not feel there should be anything in there that would indicate that the Government of the United States is trying to interfere with State laws, but that this is proposed for Federal revenue purposes only.

Mr. Frear. Concerned only with the Federal income-tax liability.

Mr. Lemke. Yes. With that modification I think this law is fair. I cannot see that it interferes with those 8 States any more than it does with any others.

Mr. Hill. I will say to the gentleman that my understanding is that that implication is in this bill. I do not think there is any question about it. What does it mean? It does not mean that it shall be considered the property of the one having management and control except for the purpose of Federal taxation.

Mr. Frear. That is right.

Mr. Hill. I do not think there is any question about it.

Mr. Lemke. Do you not think that the bill as it is written acts uniformly throughout the Nation and applies to the 48 States, including those 8?

Mr. Hill. It was not intended that way. If you will read the bill carefully you will see that the right to tax this income under this bill is based upon management and control—not ownership, but management and control. It is sought or was sought in the drafting of this measure to confine it to the eight community-property States. Whether it is so confined will, of course, be a question that the courts will have to decide. But if it is based on management and control, you might with equal propriety go out to North Dakota and tax to the husband in that State the total of the income of the husband and of the wife, if the wife had sufficient confidence in the husband to allow him to manage and control her estate.

Mr. Lemke. And the other way around, if the husband had sufficient confidence in his wife.

Mr. Hill. Yes; the other way around. But it is intended, I will say—the draftsman of the bill so intended—that it should be confined strictly to the eight community-property States. So that it

was being directed specifically to these eight States having community-property laws. That is the purpose of this legislation.

Mr. Lemke. May I say there that I agree with the gentleman, and that, I think, is the feeling of every Member of Congress who does not live in those eight States, that you have been—you do not like the word "dodge"; let us put it this way—that you have been getting away from paying your just proportion of the taxes. That is our feeling and I feel that the gentleman will agree with me that that should not be.

Mr. Hill. I cannot agree with your premise, in the first place, because it is a matter of public record that in all of these 40 noncommunity-property States, separate returns are being made by husband and wife, and it is a known fact that the property is being divided between the husband and wife for the purpose of enabling them to make separate returns on incomes from that invested property in order to keep the taxes out of the higher surtax brackets. That proposition is admitted.

Mr. Lemke. We had a splendid illustration of it in the Mitchell case in New York, did we not? But that is no reason why we should continue it here.

Mr. Frear. This law would reach that case, would it not?

Mr. Lemke. This law would reach it. At least, if it does not, I would suggest an amendment so that it would. I do not think there should be another repetition of that kind of thing.

Mr. Hill. If there is fraud in the transfer between the husband and wife for the purpose of evading taxes and the Treasury Department can catch up with it, they certainly will check up on it and not permit it. But there are a great many legitimate transactions, perfectly legitimate under the State laws, whereby a husband or a wife may transfer property to one or the other and divide the vested interests of the family so that each one will have a certain definite proportion of it. The income from that will be separately owned and can be separately returned for tax-paying purposes.

Mr. Lemke. As far as the legitimate transactions go, you would have the same right under this law in your State still to continue as the other 40 States are.

Mr. Hill. The law in the eight community-property States says that this property acquired during the marital relationship is community property and that 50 percent of it belongs to the wife and 50 percent of it belongs to the husband. The State fixes the status and the husband and wife have nothing to do with it. They are powerless to do anything about it.

I want to say, Mr. Chairman, that I certainly think the gentleman from North Dakota has brought here a fair proposition. I am not conceding on the legality of that any more than I am the legality of the proposed legislation. But so far as fairness and equity are concerned, I think it is fair when he makes it apply to all of the 48 States and not simply to the 8 States.

Mr. Frear. Let me ask this question so there will be no misunderstanding on the record. The gentleman from North Dakota is speaking now of the bill before us?

Mr. Lemke. Yes.

Mr. FREAR. And you favor that bill?

Mr. LEMKE. Yes. I think that it is fair. As I have stated, I would add the words to the effect that it applies only to Federal revenue taxation.

Mr. FREAR. So as to identify it with the Federal income tax?

Mr. LEMKE. I would not want any confusion there. Personally, I want it understood that I am not opposed to the community property law. In fact, I favor it. But I want a just distribution of the Federal burden of taxation.

Mr. HILL. As I understood the gentleman, he would favor this proposed legislation if it applied to the 48 States and not merely to the 8 States.

Mr. LEMKE. Yes; I think it should apply to all equally under the same conditions.

I am very much obliged to the committee for the opportunity of making this statement.

Mr. SHALLENBERGER. We are very much obliged to you, Mr. Lemke, for your very interesting statement.

Let me say that Mr. Englebright of California was present but was unable to remain, and wishes to be recorded in opposition to the bill.

Mr. FREAR. Mr. Chairman, Mr. Stam, attorney for the committee, has been here and has heard the arguments of all the witnesses. I have heard but a few of them. I suggested to him yesterday that he make some comment on the bill, for the record, inasmuch as he represents the joint committee.

Let me say that those who come from community-property States have been very active in their appearance here in opposition to the bill, and that is quite proper. Those from other States have not shown such a decided interest. However, I understand that they have been notified that they might appear.

Mr. SHALLENBERGER. Both by telephone and by letter.

Mr. FREAR. Of course, I think it is commendable that anyone representing his State should make his position known. For myself, I am trying to represent the State that has attempted to reach this situation. I should like to hear what Mr. Stam has to say, if anything, in answer to the arguments that have been presented.

Mr. SHALLENBERGER. Mr. Stam, have you any further statement you wish to present? As I understand, you filed a statement yesterday for the record.

Mr. STAM. Yes. That was a brief in connection with the direct tax.

Mr. SHALLENBERGER. Is there anything you want to present further?

Mr. STAM. Of course, this question we think is a very close question. I mean, you really cannot say from the legal standpoint just what the Supreme Court will do. But we do think that there is a fair chance that this particular bill will be upheld, and I wanted just to call your attention to certain statements made by counsel for the opponents of the bill.

STATEMENT OF COLIN F. STAM, COUNSEL, JOINT COMMITTEE ON INTERNAL REVENUE TAXATION

Mr. SHALLENBERGER. Mr. Stam, we shall be glad to hear from you at this time. But before you begin, in order to clarify the record, as I recall Mr. Hill's statement, this bill primarily affects the eight community-property States. It is directed toward them. Is that because of the language that is contained in the bill beginning with line 5 and reading:

> property of a marital community shall be considered as the property of, and income of a marital community shall be considered as the income of, the spouse who has the management and control thereof * * *

Now, that is very easily understood by me. I think you mean to say that both the property and the income of that marital relationship shall be subject to taxation of the spouse who has the management and control thereof.

Then there is this additional language:

> Under the law of the jurisdiction in which the marital community exists, * * *

That is the language that bears more directly on the eight States, is it not?

Mr. STAM. That is what we thought.

Mr. SHALLENBERGER. As I understand it, from all the testimony and the very learned discussion that we have had here, those eight community property States—and I think Mr. Hill will agree with me—have special laws affecting the control and management of the property, just how far that goes, and you are seeking to have this proposed legislation reach that point, and that is the point wherein it does affect directly these eight States. Is that correct?

Mr. STAM. If the management and control is conferred by State law rather than by act of the parties, this bill will apply.

Mr. SHALLENBERGER. I want to say this. At the outset I had something of the same opinion as Mr. Lemke. At the first reading of this bill, it does appear to affect all the 48 States. But when you come to analyze the particular point, it seems to me as it has been drafted, it is directed toward those eight States.

Mr. STAM. Yes.

Mr. FREAR. Let me ask you this question to see whether it does not affect all of the States. If the wife has an independent estate, received from someone other than her husband, all the States tax that alike. That is, that belongs to her.

Mr. STAM. Of course, she has the control and the management of it.

Mr. SHALLENBERGER. Even in the community-property States.

Mr. STAM. That is correct.

Mr. SHALLENBERGER. And the point that I made still stands, that this affects the joint income of property that is controlled in those community-property States.

Mr. STAM. I think that is right.

Mr. HILL. As to the husband having management and control of the wife's separate property, in the community-property States

the law does not confer upon the husband management and control of that separate property.

Mr. Stam. That is right.

Mr. Hill. He might actually have management and control, though.

Mr. Stam. He might have management and control by the wife's consent, by an assignment by the wife.

Mr. Shallenberger. Will you now proceed and cover those points you want the committee further to consider?

Mr. Stam. The first point I wanted to bring out is the question of direct tax. There has been some question as to whether or not the income tax is a direct tax or an indirect tax after the sixteenth amendment and that question is somewhat important for this reason: The Supreme Court has held uniformly that a direct tax must be based upon ownership of the property. Of course, in the community-property States, it is admitted that the husband owns only one-half of the community income, the other half is vested by operation of the State law in the wife. I think the Supreme Court settled that question in *Poe* v. *Seaborn* and other cases affecting the community-property States.

Judge Donworth, of Washington, made the statement that the Supreme Court has uniformly held that the income tax is a direct tax. I do not feel that that statement is correct, and I wish to point out that another opponent of the bill, an attorney from Los Angeles, Calif., whose brief was filed by Mr. Evans, made this statement in his brief: "That income taxes are excise taxes is not open to question." And then he cites a long list of cases.

Now, the question is rather important, because a direct tax must be based upon ownership, whereas an excise tax does not have to be based upon ownership.

Then we also have this important point. Indirect taxes or excises are subject to the rule of uniformity. Direct taxes are not subject to the rule of uniformity. They are subject to the rule of apportionment. But, of course, the sixteenth amendment provides that income taxes shall not be subject to the rule of apportionment. Therefore, if you hold an income tax is a direct tax it is not subject to the rule of uniformity or to the rule of apportionment.

On the other hand, if you hold an income tax is an indirect tax, it is subject to the rule of uniformity.

I just wanted to bring that point out, because I think it is very important. Judge Donworth admits that excise taxes do not have to be based upon ownership of the property.

Mr. Frear. Was he supporting this bill?

Mr. Stam. The judge, as well as Mr. Evans' lawyer, was opposing the bill. Both attorneys were opposing the bill. But both had different views on this question. One held that income tax was a direct tax and the other held that it was an excise tax.

Mr. Frear. And whom did the judge represent?

Mr. Stam. Judge Donworth represented the State of Washington taxpayers.

Mr. Hill. Would you mind an interruption at this point?

Mr. Stam. No.

Mr. Hill. Your contention is that the income tax is an indirect tax, is an excise tax, and subject to the rule of uniformity rather than being a direct tax and subject to the rule of apportionment?

Mr. Stam. Of course, it would not be subject to the rule of apportionment now, because of the sixteenth amendment.

Mr. Hill. If it is an indirect tax, it is subject to the rule of uniformity?

Mr. Stam. Yes.

Mr. Hill. This legislation proposes that the income shall be taxed to the owner as to 40 States, and as to 8 States, it should be taxed to the one having management and control. Assuming that it is an indirect tax, does not it violate the rule of uniformity in that respect?

Mr. Stam. We think it does not, because of the fact that the spouses who are given the management and control by operation of State law are all treated alike throughout the country. In other words, if they are given management and control by operation of State law, then they are treated alike.

Mr. Hill. But it is a recognized fact, universally admitted, that these eight community-property States by reason of the peculiarity of that system of law—the States conferring a certain degree of management and control upon one of the spouses as to community property—in the other 40 States there is no such statutory provision.

Mr. Stam. That is true.

Mr. Hill. In view of that well-recognized fact, are you not violating the rule of uniformity when you frame legislation so that it applies peculiarly to a certain group of States, to the exclusion of the remaining States of the Union?

Mr. Stam. We do not feel that you are, because as I say you are treating all husbands who are similarly situated alike. If the State law in the noncommunity-property States conferred such management and control upon the husband as is conferred in the community-property States, then the bill would apply to them. Otherwise it would not.

There is another question that I think has not been considered, and that is that the present law operates unfairly against the wife in the community-property State, because it requires her to include in her return income from community property, over which she has not control or management and concerning which the Supreme Court in a Texas case said the husband treats as if he were the owner. It seems to me that that certainly is an unfair situation.

Mr. Hill. I think you have gone a little far in that statement. The law says it is her property.

Mr. Stam. I know, but——

Mr. Hill. And the law says, if you want to live in the State of Texas, we have this system of laws. She voluntarily submits to that proposition. But it is still her property, it is her income, and the husband has not the absolute control. It is not a case where she has nothing to say as to the disposition of the property. She has a remedy in the courts, if he is trying to dissipate it or transfer it to defraud her of her rights.

Mr. Frear. But that is only in case of fraud or dissipation.

Mr. STAM. But the court said in that Texas case that the husband could deal with it very much as if it were his own. And it seems unfair to me, just looking at it from that angle, when a wife does not have any control or management of the property, to require her to pay an income tax on it when somebody else has the full disposition of it.

I just bring the point up because I do not believe it has been brought out heretofore.

Then there is another question. The opponents of the bill have stressed the point in the trust cases cited by us that the grantor of the trust originally owned the property, and that he retained a defeasible interest in the property after he created the trust. They point out that in the community-property States that is not the case, that the husband never did own the income, that by operation of State law it went directly to the wife.

It does not seem to me this distinction is very important when you consider that the control and management which the husband gets by operation of law may be equivalent to ownership of the property. Why should it make any difference whether he originally owned the property or not, if at present he has something which is equivalent to ownership?

Mr. HILL. You do not contend that it is equivalent to ownership, do you?

Mr. STAM. I think he has the enjoyment of benefits and privileges of such a substantial nature that the Supreme Court might hold that they were constituents of ownership.

Mr. HILL. You recognize the holding of the courts in *Poe* v. *Seaborn* and the cases following it that the ownership, as was held by the Supreme Court of the United States, was equally in the husband and the wife. So that point is settled.

Mr. STAM. Legal ownership.

Mr. HILL. So there is no contention that this is equivalent to ownership, because it is not.

Mr. STAM. I do not say it is equivalent to legal ownership. I say that the court has held that the husband does not have the legal ownership under the State law. But the question now is whether he has something which may be regarded as the equivalent of ownership.

Mr. HILL. Management and control in a representative capacity is not equivalent to ownership, is it?

Mr. STAM. Not necessarily.

Mr. HILL. And that is the capacity in which he handles it, in which he handles the estate of the wife. That is, he handles her part of the property in a representative capacity, not as the owner, but as agent—in a representative capacity.

Mr. STAM. Of course, the court went pretty far in that Texas case when it said that he could deal with it as if he were the owner, and of course an ordinary agent cannot do that.

Mr. HILL. If you have a blanket power of attorney, you can do that thing and still be acting in a representative capacity.

Mr. STAM. I do not think you can go as far as you can in the community-property States. Moreover, in the case of a power of attorney, the authority is voluntarily given, whereas in the community-property States the wife has no voice in the matter as the management and control is given to the husband by operation of law at the very moment the income comes into existence. There is another point that just came to me and that is this: I think the attorney from Louisiana brought out the point that the community-property system actually provides for the wife; that is, the husband realizes that his wife is actually provided for. He does not have to worry about leaving her property or anything of that sort. I want to point out that in the noncommunity-property States the husband also has to provide for the wife. He is required to support his wife. He is required to make contributions for support, and if he does not support his wife she can go into court and compel him to do so.

Mr. HILL. You do not mean to say that in these community-property States there is no legal obligation on the husband to support his wife?

Mr. STAM. The community-property system takes care of that to a large extent.

Mr. HILL. Why, in every one of those community-property States one of the grounds for divorce is nonsupport. There is a legal obligation on the part of the husband in every one of those States to support his wife and his family, regardless of the community-property system.

Mr. STAM. But the support comes out of the community property, does it not?

Mr. HILL. Not necessarily. It does not make any difference where it comes from, he has the obligation, the broad obligation of supporting his wife, in those eight community-property States, just the same as is the case in the 40 noncommunity-property States, and his failure to support constitutes grounds for divorce in every one of those States.

Mr. STAM. I know, but when she goes into court in the community-property States, as I understand it, and asks for an accounting, they settle this question on the portion of the property belonging to her and they dissolve the community, do they not?

Mr. HILL. They can settle as to the community property, and I think there is probably one State—perhaps Louisiana; I am not so familiar with that—where the division of property is along the lines of the moieties; that is, one-half the husband and one-half the wife. In my State, in the State of Washington, in any divorce action, we will say an action inter vivos where the parties are both living, on certain grounds, the court may dissolve the marriage, and the wife may be awarded not only one-half of the community property but she may be awarded any portion up to all of the husband's half of the community property or take all of his separate property. The court has absolute blanket power to make that adjustment between the husband and the wife as the equities of the case may appeal to him.

Mr. STAM. But ordinarily, would they take the husband's separate property?

Mr. HILL. They have done it in instance after instance in my State. Of course, they are extreme cases—I would not say extreme cases, exactly, but they are cases where the equities appeal to the court as justifying such action. But the court is empowered to

make the distribution of property between the husband and the wife as to all of the community property and as to all of the separate property of the spouses.

Mr. FREAR. May I make a suggestion along another line? In the noncommunity-property States, of course, the husband is responsible for the support of his wife and upon his death she gets her dower interest. Of course, the interests of the wife are protected so far as possible in the non-community-property States.

Mr. STAM. Yes; that is true.

Mr. CHAIRMAN. I have only one other point to bring out. The partnership situation in the non-community State has been discussed. It is true that the courts have held in a number of cases that husbands and wives may enter into a partnership relationship. But it seems to me that is not comparable with the community property system for the reason that in the non-community-property States the individual members of the partnership are absolutely liable, personally liable, for the debts of the partnership. In other words, the creditors can go against the separate estates of both parties in the non-community-property States. As I understand it, in the community-property States, the community debts cannot generally be applied against the wife's personal or separate estate. I just wanted to make that one distinction.

Mr. Chairman, I feel that there is good ground for having the Supreme Court pass upon this community-property question, and that there is a strong possibility that the proposed bill will be upheld.

Mr. HILL. Let me ask you one further question: On this question of the tax on income being an indirect tax—and you contend it is?

Mr. STAM. Yes; just as the California counsel also contended.

Mr. HILL. Assuming for the purpose of the question that you are correct—not conceding, but assuming that you are correct, do you consider the tax on incomes as an excise tax in the same broad sense as you consider an excise tax on tobacco or intoxicating liquors? In other words, as it applies solely to the subject matter of the tax, entirely separate and apart from the ownership of the income?

Mr. STAM. Of course, in the tax on tobacco you are taxing a specific act. In the tax on tobacco you are taxing the manufacture of tobacco or you are taxing the sale of tobacco. In some cases you are taxing the transfer. Now, in the case of the income tax, you are taxing the income. You are not taxing any particular act, such as a transfer or a sale. But the theory back of the whole thing is that direct taxes in the constitutional sense are only certain classes of taxes and every other class is an indirect tax.

Mr. HILL. Is income property?

Mr. STAM. I think that would depend somewhat on the statute, but in general I would say it is property.

Mr. HILL. And you are taxing the income?

Mr. STAM. Yes.

Mr. HILL. So you are taxing property.

Mr. STAM. Well, the answer to that is that Supreme Court said that in the constitutional sense a direct tax on the income is not a direct tax on the property after the sixteenth amendment.

Mr. HILL. You are talking about the property that produced the income?

Mr. STAM. Yes.

Mr. HILL. But is income itself property?

Mr. STAM. In the constitutional sense, drawing a distinction between a direct tax and an indirect tax, I would say not, under decisions of the Supreme Court.

Mr. HILL. Aside from that question, I want to know what your opinion is as to whether income is property. I have got a thousand dollars of income here. Is that property?

Mr. STAM. In the ordinary sense I would say yes.

Mr. HILL. The income tax is against that income?

Mr. STAM. That is right.

Mr. HILL. It is against the property. Do you think you could tax or fasten the obligation on that income which is a tax on property that belongs to me, on John Jones, for instance?

Mr. STAM. Well, I think you could depending upon the control or management that you had over the property.

Mr. HILL. That is all.

Mr. FREAR. May I ask one more question? May I suggest that anything in addition that Mr. Stam wishes to present either on his own part, or for Mr. Parker, be submitted to the clerk of the committee for insertion in the record, inasmuch as we have an amendment yet to consider, and there is a full meeting of the committee at 11:30 o'clock?

Mr. STAM. Very well. At the risk of some repetition, I will insert a statement covering some of the questions raised at the hearings.

(The further statement of Mr. Stam is as follows:)

The opponents of the bill seem to have conflicting views as to whether the income tax is a direct tax or an excise tax. Judge Donworth, of Washington, to support his contention that the income tax must be based on ownership and not on management and control, holds that the income tax is a direct tax in the constitutional sense. On the other hand, Mr. Mossaman, of the California bar, states in a brief filed by Congressman Evans that "income taxes are excise taxes is not open to question." It is conceded that excise taxes do not have to be based upon ownership. However, Mr. Mossaman claims that income taxes are excise taxes, because he takes the position that the proposed bill violates the rule of uniformity, which rule is not applicable to direct taxes but only to excise or indirect taxes. We feel that the income tax is now regarded by the Supreme Court as an excise or indirect tax in the constitutional sense. The only reason the income tax was regarded as a direct tax in the first place was because that Court in the *Pollock case* went back and looked at the property from which the income was derived and held, in effect, that a tax on the income was a tax upon the property itself. In other words, a tax on income, while in common understanding was direct merely on the income and only indirect on the property, was regarded by the Supreme Court as direct on the property in the constitutional sense. The decisions of the Supreme Court seem clearly to indicate that the income tax would never have been held to be a direct tax but for the fact that it was regarded as a tax upon the property itself. The sixteenth amendment, according to later decisions of the Supreme Court, forbids the further application of the rule requiring a consideration of the sources from which the taxed income is derived, by which rule alone such taxes were removed from the excise tax class and put into the direct tax class. The decisions of the Supreme Court rendered after the Sixteenth Amendment held, in our opinion, that the effect of that amendment was to take a tax upon income derived from sources which had theretofore made it a direct tax out of that category and put it into the class of excises, duties, and imposts. The income tax can, therefore, no longer be regarded as a direct tax, but must be treated as an excise or indirect tax (see memorandum of Mr. Stam to Mr. Parker, dated May 21, 1934).

Mr. Mossaman contends that the income tax, being an excise tax, the bill violates the rule of uniformity, to which all excise taxes are subject under the Constitution. We are of the opinion that although the income tax is an excise tax, the bill does not violate the rule of uniformity, since every spouse given management and control of the property by operation of State law is treated alike throughout the United States. The fact that some wives by voluntary agreement give up the management and control to their husbands does not seem to violate this rule. A somewhat similar question was considered by the Supreme Court in *Florida* v. *Mellon* (273 U.S. 266). In that case, it was contended that the Federal Government by allowing a credit against the Federal estate tax for estate and inheritance taxes paid to the States was violating this rule. It was pointed out that the effect of the Federal law was to require some estates of decedents to bear a heavier Federal estate tax than other estates, because in some of these States the inheritance and estate taxes were much lower than in others and in a few States like that of Florida no estate and inheritance taxes were imposed at all. In disposing of this contention, the Supreme Court said:

"The contention that the Federal tax is not uniform, because other States impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several States, nor control the diverse conditions to be found in the various States, which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (art. 1, sec. 8, clause 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

The rule of liability under the bill is, in our opinion, alike in all parts of the United States, since all spouses having management and control of the community property by operation of State law are treated alike. The bill, of course, to some extent makes its operation dependent upon State law, but this is certainly permissible, since the Supreme Court pointed out in the *Harmel case*, referred to later, that the Federal statute by express language or necessary implication *may* make its operation dependent upon State law.

(2) The present law operates unfairly against wives of community-property States. It forces a wife in a community-property State to pay a tax on income, the management and control of which is entirely in the husband; and which the Supreme Court in at least one case (*Hopkins* v. *Bacon*, 282 U.S. 122), stated that the husband may deal with it very much as if it were his own. The wife never did have management and control of the community property, as it was conferred in the husband by operation of State law from the moment the income came into existence. This is very different from the case where the wife originally had the right of management and control but assigned that right to the husband. In the latter case, there would be no more inequity in taxing such income to the wife than in taxing the income of a revocable trust to the grantor. In fact, in one case (*Matern* v. *Comm.*, 61 Fed. (2d) 663), the Circuit Court of Appeals for the Ninth Circuit held that where title to the property was in the wife but she permitted her husband to manage the property because of her inexperience, the income from the property was probably taxable to the wife. In the community-property States the wife does not have any voice in the matter, as the power to manage and control the community property is conferred upon the husband under the State constitution or State law. This will result in serious hardship, in cases where the wife has separate income, since it may force her into the higher surtax brackets and thus deplete her separate estate by the amount of the additional tax. The proposed bill corrects this inequity.

(3) The opponents of the bill claim that the "management and control" of the husband in community-property States is not a sufficient basis for taxing the husband upon all of the community income. This is, of course, a question for the Supreme Court to decide. It appears to depend upon the extent of this privilege accorded to the husband. Justice Holmes in the *Robbins case* (269 U.S. 315) seemed to be of the opinion that such management and control would be sufficient to warrant a tax against the husband when he said, "Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole." And Justice Cardozo in the *Wells case* (289 U.S. 670) stated that the "government in casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only ownership, but any right or privilege that is a constituent of ownership." The opponents of the bill have tried to distinguish the *Wells case* and other trust cases from the community-property situation by stating that in trust cases the grantor "was the owner of the income, or had been the owner and was a grantor of a defeasible interest, retaining an interest himself." But does it make any difference so long as the husband has a right or privilege which is a constituent of ownership, whether he formerly had full ownership in the property? We think not. It is the present interest which the husband now has which we are considering in determining whether or not such interest is sufficient upon which to base a tax.

(4) Some opponents of the bill have made the statement that the community-property system insures that the wife is well provided for. But the noncommunity-property states also protect the wife. They compel the husband to provide for the support of the wife and provide her with dower interests or other interests upon the death of the husband. In many cases the wife in noncommunity-property States must join with the husband in executing a deed to real estate. Nevertheless, the husband has to pay a full tax on his earnings in the noncommunity-property States.

(5) In many of the noncommunity-property States, husband and wife may enter into a partnership, which it is claimed puts the husband and wife on a parity with the husband and wife of the community-property States. While the decisions on this point are conflicting, there have been cases where such a partnership has been recognized in a noncommunity-property State, even though the wife did not contribute either capital or services to the partnership. However, it should be borne in mind that the wife risks losing her entire separate estate by such an arrangement, for if the partnership assets are not sufficient to pay the partnership debts, the creditors can proceed against the wife's separate property. In the community-property States, the wife's separate estate cannot generally be proceeded against for community debts. Morover, the gift tax checks transfers of property between husband and wife in noncommunity property for tax-avoidance purposes to a large extent. Furthermore, in the Revenue Act of 1934 we refuse to recognize losses on sales between husband and wife (sect. 24 (a) (6)). The assignment of salary is referred to later.

(6) The husband in a noncommunity-property State cannot for income-tax purposes assign his salary or his interest in a partnership to his wife. This was decided by the Supreme Court in *Lucas* v. *Earl* (281 U.S. 111), and in *Burnet* v. *Lenninger* (285 U.S. 136). In the community-property States such assignments take effect by operation of State law, and are recognized for Federal income-tax purposes. The proposed bill removes this discrimination.

(7) It is contended by the opponents of the bill that we must follow the State law in determining whether the husband or wife shall pay the tax. However, the Harmel case (287 U.S. 103) and the Burk-Waggoner case (269 U.S. 110) show that the Supreme Court has not always followed the State law in applying the Federal income tax. In fact, the Supreme Court in the Harmel case cited the community-property-tax case of *Poe* v. *Seaborn* (282 U.S. 101) as authority for the statement that "State law may control only when the operation of the Federal taxing act, by express language or necessary implication, makes its own operation dependent upon State law."

(8) It is contended that so far as California is concerned the proposed bill will violate the treaty with Mexico in taxing all of the community income to the husband. It is stated that under the terms of such a treaty Californians who were Mexican citizens at the time of the transfer of California to the United States must have the same property rights which they had had previously under the rule of Mexico. But the bill does not take away any rights which they previously had in this respect. Under the Mexican community-property system the wife does not have a vested interest in the community property but a mere expectancy. Therefore, under the Mexican law all of the community income would be taxable to the husband. (Treasury ruling, I.T. 1646, C.B. II-1, 145.) This was also the law in California prior to 1927 (*U.S.* v. *Robbins*, 269 U.S. 315.)

(9) The question of the right of Congress to tax the community income to the spouse having management and control has never been squarely before the Supreme Court. The cases cited by the opponents of the bill as justifying the conclusion that the Supreme Court has passed upon this question do not appear to be in point. The community-property-tax cases (*Poe* v. *Seaborn*, 282 U.S. 101; *Goodell* v. *Koch*, 282 U.S. 118; *U.S.* v. *Malcolm*, 282 U.S. 792; *Bender* v. *Pfaff*, 282 U.S. 127; and *Hopkins* v. *Bacon*, 282 U.S. 122) merely

held that under existing law Congress did not intend to tax the community income to the husband. They do not deal with the power of Congress to tax such income to the husband. The Hoeper case (284 U.S. 206), which attempted to tax the husband on his wife's income, is also not in point, since that case involved residents of the State of Wisconsin, not a community-property State, and the husband has no management or control of his wife's income under the laws of that State. This bill will put the question of the power of Congress to tax the community income to the spouse having the management and control thereof squarely before the Supreme Court.

Mr. SHALLENBERGER. That will be satisfactory. These hearings are concluded, then, and the committee will now go into executive session.

(Whereupon the committee went into executive session.)

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